(1)

Supreme Court, U.S.
FILED

97 1112 DEC 31 1997

OFFICE OF THE CLERK

No. 97-___

In The

Supreme Court of the United States

October Term, 1997

RICKY BELL, WARDEN,

Petitioner,

v.

RICHARD H. AUSTIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN KNOX WALKUP
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General
Counsel of Record

Office of the Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243-0497
(615) 741-3226
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

107 pp

CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

1. Does a federal habeas court have the authority to hold an evidentiary hearing to develop facts that were not developed by the habeas petitioner in support of the same legal claim in state court, absent compliance with the cause and prejudice standard applied by this Court in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992)?

2. Does the failure to investigate and present evidence of the defendant's character at a capital sentencing hearing constitute a *per se* denial of the Sixth Amendment right to the effective assistance of counsel, without regard to whether the omission of such evidence could have affected the balance of aggravating and mitigating circumstances in the eyes of the sentencing jury?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

I. Procedural History 1

II. Facts Relevant to the Petition 1

III. The Opinions Below 8

REASONS FOR GRANTING THE WRIT 11

I. THE COURTS BELOW HAVE REFUSED TO FOLLOW DISPOSITIVE PRECEDENT FROM THIS COURT INTERPRETING THE PROPER MEANING AND APPLICATION OF 28 U.S.C. § 2254 IN CASES WHERE A HABEAS PETITIONER HAS FAILED TO DEVELOP FACTS IN PRIOR STATE COURT PROCEEDINGS TO SUPPORT HIS CLAIM OF CONSTITUTIONAL ERROR 11

II. ON THE MERITS OF RESPONDENT'S SIXTH AMENDMENT CLAIM, THE COURTS BELOW HAVE DISREGARDED THIS COURT'S DECISIONS IN *STRICKLAND V. WASHINGTON* AND *DARDEN V. WAINWRIGHT* 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES CITED:

Austin v. State, No. 33 (Tenn. Crim. App. April 17, 1985), *cert. denied*, 474 U.S. 1073 (1986) 2

Austin v. State, No. 17 (Tenn. Crim. App. December 10, 1986), *cert. denied*, 484 U.S. 872 (1987) 2, 6, 12

Austin v. State, No. 02C01-9102-CR-00009 (Tenn. Crim. App. August 14, 1991) 2

Austin v. State, No. 02C01-9310-CR-00238 (Tenn. Crim. App. May 3, 1995) 2

Burger v. Kemp, 483 U.S. 776 (1987) 13, 18

Darden v. Wainwright, 477 U.S. 168 (1986) 13, 17, 18

Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) 11, 12, 13, 14, 15, 16

Lindh v. Murphy, 117 S. Ct. 2059 (1997)..... 11

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 14

State v. Austin, 618 S.W. 2d 738 (Tenn.), *cert. denied*, 454 U.S. 1128 (1981) 2, 3

Strickland v. Washington, 466 U.S. 668 (1984) 12, 13, 16, 17, 18

Sumner v. Mata, 449 U.S. 539 (1981)..... 15

Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533 (1983)..... 16

STATUTES:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254 (amended 1996).....11, 14

28 U.S.C. § 2254(d) (West 1996)..... 11

28 U.S.C. § 2254(e) (West 1996) 11, 15

TABLE OF AUTHORITIES – Continued

Page

Tenn. Code Ann. § 39-107 (repealed) 1

Tenn. Code Ann. § 39-2404(i)(4) (repealed) (now § 39-13-204(i)(4) (1997 Repl.) 2

PETITION FOR A WRIT OF CERTIORARI

The Attorney General and Reporter of the State of Tennessee, on behalf of Ricky Bell, Warden, petitions for a writ of certiorari to review that portion of the judgment of the United States Court of Appeals for the Sixth Circuit in this case vacating respondent's death sentence.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is published at 126 F.3d 843. The opinions of the district court (App. B and App. C) are reported at 938 F.Supp. 1308 and 927 F.Supp. 1058.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1997. No rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Procedural History

Respondent Richard H. Austin ("respondent" or "Austin") was convicted by a jury in 1977 in the Criminal Court of Shelby County, Tennessee, for the offense of accessory before the fact to murder in the first degree, in violation of Tenn. Code Ann. § 39-107 (repealed). The jury sentenced him to death after finding (1) that the evidence

established as an aggravating circumstance that Austin had either committed the murder for remuneration or promise of remuneration, or had employed another to commit the murder for remuneration or promise thereof (Tenn. Code Ann. § 39-2404(i)(4) (repealed) (now § 39-13-204(i)(4) (1997 Repl.)) and (2) that no mitigating circumstances outweighed that aggravating circumstance. The Supreme Court of Tennessee affirmed (*State v. Austin*, 618 S.W. 2d 738 (Tenn. 1981)), and this Court denied certiorari (*Austin v. Tennessee*, 454 U.S. 1128 (1981)). Austin thereafter mounted four separate collateral attacks in state court, but relief was denied and the judgments were affirmed on appeal.[1]

On March 27, 1986, Austin filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee. By order and memorandum opinion dated January 26, 1996, the district court entered summary judgment in Austin's favor on his claims of defective jury instructions and ineffective assistance of counsel at the guilt and penalty phases of his 1977 trial, vacated the conviction and death sentence, and directed that a writ of habeas corpus issue unless the State afforded Austin a new trial within 120 days. (App. B). Thereafter, by order and memorandum opinion dated May 9, 1996, the district court denied relief on all remaining claims. (App. C.).

---

[1] *Austin v. State*, No. 33 (Tenn. Crim. App. April 17, 1985), *cert. denied*, 474 U.S. 1073 (1986); *Austin v. State*, No. 17 (Tenn. Crim. App. December 10, 1986), *cert. denied*, 484 U.S. 872 (1987); *Austin v. State*, No. 02C01-9102-CR-00009 (Tenn. Crim. App. August 14, 1991); *Austin v. State*, No. 02C01-9310-CR-00238 (Tenn. Crim. App. May 3, 1995).

In an opinion filed October 2, 1997, a panel of the United States Court of Appeals for the Sixth Circuit reversed the district court's findings of constitutional error during the guilt phase and reinstated Austin's conviction. The panel, however, affirmed the district court's finding of ineffective assistance of counsel at sentencing and ordered that the case be remanded to state court for a new sentencing hearing. (App. A).

II. Facts Relevant to the Petition

1. The proof at Austin's trial is accurately summarized in the opinion of the Tennessee Supreme Court on direct appeal. *State v. Austin, supra,* 618 S.W. 2d at 739-40. Austin was convicted of employing and paying an escaped convict, Jack Charles Blankenship, to execute in gangland fashion Julian Watkins, an undercover agent for the Memphis police vice squad. Austin operated an establishment known as the Golden Cue. Members of the Memphis police vice squad suspected that illegal gambling operations were being conducted at the Golden Cue. They employed Watkins, a reserve deputy sheriff, to engage in an undercover operation at the establishment between January and April, 1977. Watkins reported to the police on illegal gambling he observed at the club and, as a result, ten indictments were obtained and arrest warrants were served on Austin and several of his employees on April 20. Watkins accompanied the officers when the warrants were served, identifying the persons named in the warrants. When it was necessary for the police to return on May 18 to serve additional warrants not served earlier, Watkins again accompanied the officers. On this occasion, Austin engaged Watkins in a conversation and

ascertained that Watkins would be at his place of business, a body repair shop, on the following Monday, May 23.

An employee of Austin, Terry Lee Casteel, testified that he and Austin met with Blankenship. Austin directed Casteel to take Blankenship to Watkins' home. He did so on the evening of Sunday, May 22, but Watkins was not at home. Casteel then took Blankenship to a trailer owned by Austin over the state line in Mississippi. On the morning of May 23, Casteel and Austin picked up Blankenship. Casteel then accompanied Blankenship to Watkins' place of business.

Blankenship requested Watkins to come outside to give an estimate for some allegedly needed auto repairs. When Watkins came out, Blankenship shot him six times, fatally wounding him, re-entered his automobile, and left at a high rate of speed.

Blankenship was seen by a number of witnesses during the day on May 23 after the murder displaying large sums of money. He was arrested on May 24, pleaded guilty to first-degree murder, and was sentenced to life imprisonment. Casteel was indicted in the case along with Austin, but his trial was severed. He testified as a key witness for the State.

Austin denied any knowledge of the employment of Blankenship to murder Watkins and attempted to establish that his estranged wife had employed Casteel to concoct the scheme. Casteel denied this, and Mrs. Austin did not testify. Several employees of Austin testified that

Austin's business declined dramatically after the indictments and arrests and that Austin stated on several occasions that he would like to see Watkins killed. One of the persons to whom Austin made such statements, Golden Cue employee Marilyn Lee, testified that the week before the commencement of the trial Austin telephoned her, told her that she would get paid off if she testified in his favor, and threatened her life if she did not.

At the sentencing phase of Austin's trial, the State presented additional evidence to establish the "murder for remuneration" aggravating circumstance. Austin presented no proof.

2. As grounds for relief in his first state post-conviction action, Austin claimed that his attorney's failure to present evidence at the trial's sentencing phase constituted ineffective assistance of counsel, but he produced no proof concerning what evidence might have been presented at sentencing. The state appellate court rejected the claim, finding:

> Nothing has come to our attention, in reviewing the trial transcript and the transcript of the evidence introduced upon the hearing upon the post-conviction petition, that suggests a mitigating circumstance that should have been presented to the jury upon the sentencing hearing. Present counsel do not suggest specific evidence that should have been presented. They do mention that Austin's sister, Midge Evans, tried to get Mr. Livingston to call her as a witness during the sentencing phase and he declined; but they do not suggest what she might have testified to. It is also argued that a minister and a neighbor would have testified, we assume to

> Austin's good character. Given the facts of this case, the failure to call character witnesses for Austin would not have changed anything.

Austin v. State, supra, No. 17 (Tenn. Crim. App. December 10, 1986) slip op. at 5 (App. D. 80).

3. Austin raised the identical claim in his federal habeas corpus petition – that his lawyer's failure to present mitigating evidence at sentencing deprived him of the effective assistance of counsel. Over Warden Bell's objection that Austin's failure to develop the record in the state post-conviction proceeding precluded an evidentiary hearing on the claim, the district court granted Austin an evidentiary hearing and permitted him to produce several witnesses who claimed that, if they had been called at the sentencing phase of his trial, they would have testified about some positive aspects of Austin's character. They were:

> Martha Purser, Austin's younger sister, who would have testified that Austin was a "good person", and "well mannered"; that Austin had been good to her and gave her money to go to movies, the fair and to buy clothes, and that Austin had once helped a woman buy Christmas gifts for her children.
>
> Marsha Birdsong, Austin's stepdaughter, who would have testified that Austin was good, caring, loving and helpful, and sometimes allowed his employees to sleep at his house.
>
> Donald McClary, a boyhood friend of Austin, who would have testified that, in 1959 or 1960, Austin once gave him $100 to help him with college expenses. McClary had not seen Austin since 1967 or 1968.

Midge Edwards, Austin's older sister, who would have testified that Austin is not a "bad person".

Sean Tremble, Austin's son who was only 10 years old at the time of the murder trial, who would have testified that he loved Austin and that Austin had been a good father.

Tammy Croft, Austin's niece who was only 13 years old at the time of the murder trial, who would have testified that Austin was a wonderful uncle, attended her dance and piano recitals, and once rescued her from bee stings while she was riding her horse.

Billie Sue Edwards, Austin's sister, who would have testified that Austin was the best brother and friend anyone could have; that he bought her children gifts and would take them to movies and "putt putt"; and that he bought his parents "extravagant gifts".

Jimmy Edwards, Austin's nephew, who would have testified that he thought it was Austin who bought him his first watch; that Austin did buy him his first hunting rifle; that Austin would always send the Edwards family money; and that Austin bought family members various merchandise, including televisions and stereos.

Jenny McDaniel, a family friend, who would have described Austin as a caring and professional person who loved his parents, although she had never seen him with his parents, had no contact with Austin during the five years before the murder trial, and had been in Austin's presence for a total of 5-6 hours during the three years before that.

> Reverend Joseph B. Ingle, an ordained minister of the United Church of Christ, anti-death penalty activist, and founder of the Southern Coalition of Jails and Prisons, who stated that he was available to testify at Austin's trial, although he did not know Austin and did not specify what testimony he might have offered.

Austin's retained trial attorney, Robert Livingston, explained at the habeas corpus evidentiary hearing that his decision not to call character witnesses at sentencing was a tactical choice. Livingston expressed concern about his credibility before the jury, and he opined that he would have looked like a "fool" if he had attempted to portray Austin as a person of "good character," given that there was ample evidence already before the jury that Austin was not of good character. Livingston mentioned specifically the evidence that Austin had tried to intimidate a State witness (Marilyn Lee), Austin's gambling history, and his prior convictions. Livingston was also concerned about any rebuttal evidence the State had regarding Austin's past. Livingston stated that experience had taught him that a defendant's family members make poor sentencing witnesses in any event.

III. The Opinions Below

The district court granted habeas relief and vacated Austin's conviction and death sentence. With respect to the conviction, the district court believed (1) that the jury instruction defining "reasonable doubt" used at Austin's trial unconstitutionally lowered the State's burden of proof, and (2) that Austin had not received the effective assistance of counsel at the guilt phase of his trial. The

district court vacated Austin's death sentence on the grounds (1) that the trial court's instructions at the sentencing hearing impermissibly led the jury to believe that unanimity was required on mitigating circumstances, and (2) that Austin had not received the effective assistance of counsel at the sentencing due to attorney Livingston's failure to present any mitigating proof. (App. B 14-52).

On the issue of attorney Livingston's alleged ineffectiveness at sentencing, the district court concluded that, "[i]f Mr. Livingston had properly investigated and prepared the case, he would have called multiple witnesses who were friends, employees, or associates of [Austin], or who were religious leaders." (App. B 40). The district court did not, however, identify the witnesses referred to, discuss what their testimony might have been, or analyze how such testimony might have affected the jury's sentencing calculus, other than to express confidence that the presentation of such witnesses would have created a "strong probability that Mr. Austin would not have been sentenced to death." (App. B 44-45). Neither did the district court's opinion address Warden Bell's objection that the ineffective assistance claim was barred as a result of Austin's failure to present evidence to support the claim at the prior state court proceeding.

A panel of the court of appeals reversed the district court's judgment with respect to guilt phase errors and reinstated Austin's conviction. (App. A 3-11). But the panel affirmed the district court's finding of ineffective assistance of counsel at sentencing and remanded the

case for a new sentencing hearing.[2] (App. A 11-12). According to the panel, attorney Livingston's decision not to present any mitigating evidence at sentencing "[did] not reflect a strategic decision, but rather an abdication of advocacy" (App. A 12) and so "undermined the adversarial process" as to render "the death sentence unreliable." *Id.* The panel's opinion did not specify the nature of any mitigating evidence that Livingston should have presented, except to observe that "several of Austin's relatives, friends, death penalty experts, and a minister were available and willing to testify on his behalf." *Id.* The panel's opinion did not analyze how the absence of such evidence might have affected the sentencing jury's verdict. Like the district court, the panel did not address Warden Bell's objection that Austin's failure to present any evidence to support the identical ineffective assistance of counsel claim raised during the earlier state post-conviction proceeding should bar Austin from relitigating that claim in a federal habeas corpus action.

---

[2] The court of appeals did not reach Austin's claim that the trial court's jury instructions at sentencing were defective. (App. A 12-13).

REASONS FOR GRANTING THE WRIT

I. THE COURTS BELOW HAVE REFUSED TO FOLLOW DISPOSITIVE PRECEDENT FROM THIS COURT INTERPRETING THE PROPER MEANING AND APPLICATION OF 28 U.S.C. § 2254 IN CASES WHERE A HABEAS PETITIONER HAS FAILED TO DEVELOP FACTS IN PRIOR STATE COURT PROCEEDINGS TO SUPPORT HIS CLAIM OF CONSTITUTIONAL ERROR.

The decisions of both courts below directly conflict with this Court's decision in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). *Keeney* holds that, under the pre-1996 version of 28 U.S.C. § 2254 which governs this case,[3] a federal habeas petitioner may not obtain relief on a claim previously rejected by a state court because of his failure to present facts in the state forum supporting the claim, unless "he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice

---

[3] Because this appeal was pending at the time of the enactment of the habeas corpus reform provisions of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2254 (d) and (e) (West 1996), it is governed by the pre-1996 version of 28 U.S.C. § 2254. *Lindh v. Murphy*, 117 S.Ct. 2059 (1997). Given "the characteristically extended pendency of collateral attacks on capital convictions," (*Id.* at 2069 (Rehnquist, C.J., dissenting)), the pre-1996 version of 28 U.S.C. § 2254 continues to govern large numbers of capital habeas cases as a result of this Court's decision in *Lindh*. The correct resolution of questions arising under the prior statute thus remains of vital importance to the states and capital defendants alike.

resulting from that failure." 504 U.S. at 11.[4] Here, Austin has obtained precisely the benefit that *Keeney* forbids.

Austin presented to the state courts of Tennessee the identical claim upon which he has been granted relief in this case, namely, that attorney Livingston's failure to investigate and present mitigating proof at sentencing denied him the effective assistance of counsel guaranteed by the Sixth Amendment. "[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). But Austin failed to come forward at the state court proceeding with any "specific evidence that should have been presented" during the sentencing phase of his trial, and he introduced no proof "that suggests a mitigating circumstance that should have been presented to the jury upon the sentencing hearing." *Austin v. State, supra*, No. 17 (Tenn. Crim. App. December 10, 1986) slip op. at 4. (App. D 80). The state courts therefore correctly rejected the ineffective assistance of counsel claim on the merits, because, without such proof, Austin had failed to carry his burden of showing that counsel's performance, even if deficient, prejudiced the defense so as to deprive him of a reliable sentencing determination. *Id.* Under *Strickland, supra*, a defendant who alleges that he received ineffective assistance of counsel at a capital sentencing

---

[4] The Court also adopted in *Keeney* a narrow exception to the cause and prejudice requirement that will excuse the failure to develop a claim in state proceedings if the habeas petitioner can show that "a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." 504 U.S. at 11.

hearing "must show that [counsel's alleged unprofessional acts or omissions] actually had an adverse effect on the defense," such that "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 693, 695. *See also Burger v. Kemp*, 483 U.S. 776, 788-95 (1987); *Darden v. Wainwright*, 477 U.S. 168 (1986) (claims of actual ineffectiveness at capital sentencing hearing based on failure to investigate and present mitigating evidence subject to two prong *Strickland* standard).

Keeney binds a habeas petitioner in these circumstances to the record he made in state court, absent a showing of cause for his failure to develop the facts in the state forum and prejudice therefrom, or a fundamental miscarriage of justice. But in this case, without even acknowledging Warden Bell's timely objection that expressly relied on *Keeney*[5], the district court granted Austin the opportunity to present at a federal evidentiary hearing the evidence he failed to develop in state court, made no finding of "cause" and "prejudice" to justify such a hearing, and then used the evidence presented at that hearing to find prejudice under *Strickland* and grant relief on Austin's ineffective assistance of counsel claim. (App. B 38-45).

---

[5] Warden Bell presented his *Keeney* objection to the district court during a hearing on procedural defenses conducted on October 7, 1994 (R. 166, pp.8, 38); again in a Memorandum of Law filed August 21, 1995 (R. 161, p. 2); and yet a third time at the evidentiary hearing on October 10, 1995 (R. 198, pp.129-30).

Again, on appeal, Warden Bell expressly directed the Sixth Circuit panel's attention to his *Keeney* objection.[6] And, again, without any mention whatsoever of the objection or even of *Keeney's* existence, that court affirmed the district court's decision to grant Austin relief on his ineffective assistance of counsel claim based upon the evidence developed at the evidentiary hearing conducted by the district court in violation of *Keeney*. (App. A 11-12).

The lower federal courts should not be permitted to ignore this Court's prior decision interpreting the meaning and proper application of 28 U.S.C. § 2254 (amended 1996). "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994). Strict observance of the rule laid down in *Keeney*, designed to "accommodate concerns of

---

[6] Warden Bell presented his *Keeney* objection to the court of appeals in his principal brief, in his reply brief, and, a third time, at oral argument. Inexplicably, when reciting the procedural history of the case, the opinion of the court of appeals references only the last two of Austin's four separate state court collateral attacks on his conviction and sentence. (App. A 3). But the opinion of the Tennessee Court of Criminal Appeals cited above rejecting Austin's ineffective assistance at sentencing claim due to his failure to present evidence of prejudice was rendered in the *first* collateral attack. That opinion (No. 17 Tenn. Crim. App. December 10, 1996) (App. D) is a part of the record in this case (R. 19, Addendum 2C), and the relevant portions of it were quoted extensively in Warden Bell's various briefs in the court of appeals.

finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum" (504 U.S. at 8), is crucial to the achievement of this Court's often repeated goal of reducing the "'inevitable friction' that results when a federal habeas court 'overturn[s] either the factual or legal conclusions reached by the state-court system'." 504 U.S. at 9 (*quoting Sumner v. Mata*, 449 U.S. 539, 550 (1981)). Moreover, the fact that Congress has now essentially codified *Keeney* in 28 U.S.C. § 2254(e)(2) (West 1996)[7] as a part of the Antiterrorism and Effective Death Penalty Act of 1996 serves to underscore the importance of the *Keeney* rule as a necessary and salutary limitation on the power of the federal courts to disturb the finality of state court criminal convictions and sentences.

---

[7] 28 U.S.C. § 2254(e)(2) (West 1996) now provides:

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

In Austin's case, the courts of Tennessee more than a decade ago applied the correct "actual prejudice" standard established by this Court in *Strickland v. Washington, supra,* and rejected Austin's Sixth Amendment claim because he presented no proof in the state court that the jury's sentencing determination could have been affected in any way by his counsel's alleged errors. The district court and court of appeals, however, have disregarded that determination and have vacated Austin's sentence twenty years after it was imposed based upon evidence of "prejudice" presented at a federal evidentiary hearing that, *Keeney* teaches, should never have occurred. By refusing even to acknowledge, let alone follow, dispositive precedent from this Court, both the district court and court of appeals have so far departed from the accepted and usual course of judicial proceedings as to warrant an exercise of this Court's supervisory power. "Needless to say, only this Court may overrule one of its precedents." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983).

II. ON THE MERITS OF RESPONDENT'S SIXTH AMENDMENT CLAIM, THE COURTS BELOW HAVE DISREGARDED THIS COURT'S DECISIONS IN *STRICKLAND V. WASHINGTON* AND *DARDEN V. WAINWRIGHT.*

The lower courts compounded their *Keeney* error by applying the wrong legal standard on the merits of Austin's Sixth Amendment claim to determine that he had been deprived of the effective assistance of counsel at sentencing. The district court focused solely on attorney

Livingston's alleged breach of his "constitutional obligation to present evidence to the sentencing authority of all relevant mitigating circumstances such as the background and character of the defendant," and its finding of a Sixth Amendment violation was premised exclusively on counsel's asserted failure "to function as a meaningful adversary to the government." (App. B 44). Similarly, the court of appeals condemned counsel's conduct at the sentencing hearing as "an abdication of advocacy" and found ineffective assistance of counsel solely on that basis. (App. A 12). But neither court below analyzed the so-called mitigating evidence presented at the federal evidentiary hearing to determine whether its introduction could have affected "the balance of aggravating and mitigating circumstances" in the eyes of the sentencing jury. *Strickland v. Washington, supra,* 463 U.S. at 695. Both courts thus appear to have presumed prejudice from counsel's conduct, thereby relieving Austin of his burden of showing that counsel's alleged deficiencies "actually had an adverse effect on the defense." *Id.*

The decision below, in effect, erects a *per se* rule of ineffectiveness, applicable whenever defense counsel fails to present mitigating evidence at the sentencing phase of a capital trial, and whether or not any of the mitigating evidence that might have been presented could have affected the sentencing jury's verdict. Not only does such a rule squarely contradict *Strickland's* requirement that a defendant claiming actual ineffectiveness at a capital sentencing hearing "affirmatively prove prejudice" attributable to counsel's errors (466 U.S. at 693); it also ignores this Court's express recognition in *Darden v. Wainwright, supra,* that the failure to present character evidence at a

capital sentencing hearing is not always and invariably prejudicial to the defense. Indeed, as *Darden* observes, the presentation of such information can often "backfire" by opening the door to devastating rebuttal evidence concerning the defendant's past, precisely the concern articulated by Attorney Livingston in this case. 477 U.S. at 186.

Moreover, the *per se* approach reflected in the opinions below fails to take into account the differing weight to which such character evidence may be entitled in a rational jury's sentencing calculus, depending upon the insight such evidence can provide to explain the defendant's conduct and the unique circumstances of each case. Thus, for example, the omitted mitigating evidence in *Burger v. Kemp, supra,* would have disclosed that the petitioner "had an exceptionally unhappy and unstable childhood" of such tragic dimensions "that the sentencer could not have refused to consider" it in mitigation. 483 U.S. at 789 and n. 7. Here, by contrast, the omitted evidence consisted of testimony from a minister who did not know the defendant and a parade of the defendant's relatives who could offer no explanation why he might have financed a gangland "hit" on a law enforcement officer other than to insist, in sum and substance, that he was "not a bad person."

The failure of the courts below to apply *Strickland v. Washington* and *Darden v. Wainwright* on the merits of respondent's Sixth Amendment claim also warrants an exercise of this Court's certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted; the judgment of the court of appeals granting respondent relief on his ineffective assistance of counsel claim should be reversed; and the case should be remanded to the district court with instructions either to dismiss the claim unless respondent can establish cause and prejudice in respect of his failure to present evidence supporting that claim in the prior state proceedings or, alternatively, to dismiss the claim without further proceedings.

Respectfully submitted,

JOHN KNOX WALKUP
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General
Counsel of Record

Office of the Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243-0497
(615) 741-3226
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RICHARD H. AUSTIN, *Petitioner-Appellee,*	)	
v.	)	No. 96-5754
RICKY BELL, Warden, *Respondent-Appellant.*	)	

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 86-00293 – John T. Nixon, Chief District Judge.

Argued: April 23, 1997

Decided and Filed: October 2, 1997

Before: MARTIN, Chief Judge; MERRITT and SUHRHEINRICH, Circuit Judges.

COUNSEL

ARGUED: Michael E. Moore, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellant. Larry D. Woods, WOODS & WOODS, Nashville, Tennessee, for Appellee. **ON BRIEF:** Gordon W. Smith, Glenn R. Pruden, Michael E. Moore, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellant. Michele D. Collins, Nashville, Tennessee, Larry D. Woods, WOODS & WOODS, Nashville, Tennessee, for Appellee.

OPINION

SUHRHEINRICH, Circuit Judge. Respondent Warden Ricky Bell ("Warden Bell") appeals from summary judgment for Petitioner Richard H. Austin ("Austin") on his application for a writ of habeas corpus. Austin was convicted of first degree murder and sentenced to death by a jury in a Tennessee state court for contracting the murder of an undercover police agent. Warden Bell raises three issues: (1) whether the reasonable doubt instruction unconstitutionally lowered the state's burden of proof; (2) whether Austin was denied effective assistance of counsel in both the liability and penalty phases of his trial; and (3) whether the sentencing instruction unconstitutionally required the jury to agree unanimously on mitigating circumstances.

This Court finds that the reasonable doubt jury instruction was constitutional. We also find that Petitioner received effective assistance of counsel during the guilt phase of his trial but not during the sentencing phase. Therefore, this Court will remand to the state court for resentencing. Consequently, we need not decide whether the instruction on mitigating circumstances was constitutional. However, we caution the state court to insure that the instruction on mitigating circumstances in resentencing permits each juror to consider all relevant mitigating evidence. Accordingly, this Court **AFFIRMS** in part, **REVERSES** in part, and **REMANDS** for resentencing.

I. BACKGROUND.

A jury found Austin guilty of hiring Jack Charles Blankenship, an escaped convict, to kill Julian C. Watkins, an undercover agent for the Memphis Police Department and sentenced Austin to death.[1] Austin's conviction and death sentence were affirmed on direct appeal in the state courts. *State v. Austin*, 618 S.W.2d 738 (Tenn. 1981). The denials of his requests for post-conviction relief in state court were also affirmed. *Austin v. State*, No. 02C01-9102-CR-00009, 1991 WL 153016 (Tenn. Crim. App., Aug 14, 1991), *Austin v. State*, No. 02C01-9310-CR-00238, 1995 WL 263930 (Tenn. Crim. App., May 03, 1995).

Austin petitioned for a federal writ of habeas corpus and then moved for summary judgment. The district court partially granted Austin's motion for summary

---

[1] In early 1977, the police suspected illegal gambling at Austin's pool hall and employed Watkins, a reserve deputy sheriff, to investigate. Based on Watkins' testimony, the state obtained indictments and arrest warrants for Austin, his wife, and several employees and associates, including Terry Casteel, the manager of the pool hall. Watkins was to be the chief witness against them.

After their arrests, Austin, Blankenship, and Casteel met. During their meeting, Austin and Blankenship spoke separately, Austin then asked Casteel to drive Blankenship to Watkins' house. Casteel and Blankenship did not find Watkins there, but returned on the morning of May 23, 1977, when Blankenship killed Watkins. After the murder, Blankenship was seen with a large sum of money. The police arrested him on May 24, 1977. Blankenship pleaded guilty and was sentenced to life in prison.

Austin and Casteel were indicted for murder. Their trials were severed after Casteel agreed to testify for the State that Austin hired him to kill Watkins.

judgment and issued the writ, holding that: (1) Austin's trial counsel provided ineffective assistance in both the liability and sentencing phases of the trial; (2) the reasonable doubt instruction at Austin's trial was unconstitutional; and (3) it was reasonably likely that the jury interpreted the instructions as preventing any juror from considering a mitigating circumstance unless the jury unanimously found that circumstance. *Austin v. Bell*, 938 F. Supp. 1308 (M.D. Tenn. 1996).[2]

Warden Bell appeals from the summary judgment for Austin and challenges the district court's holdings on the ineffective assistance of counsel claim and the jury instructions on reasonable doubt and mitigating circumstances.[3] Austin has not cross appealed.

---

[2] In another opinion, *Austin v. Bell*, 927 F. Supp. 1058 (M.D. Tenn. 1996), the district court also rejected several other issues that Austin raised in his habeas petition.

[3] Warden Bell also contends that the new deferential review standards of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C.A. §§ 2254(d) and (e) and 2264(b) (West 1996), apply to this habeas appeal. This appeal was pending when the AEDPA became effective on April 24, 1996. The Supreme Court recently held in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), that the new review standards of 28 U.S.C. § 2254(d)(1)-(4), which apply to habeas claims generally, do not apply to pending cases. However, section 107(c) of the AEDPA, 28 U.S.C. §§ 2261-2266, explicitly applies these review standards to capital habeas cases pending when the AEDPA became effective, but only if the state provides for appointment and compensation of competent counsel and reasonable expenses for litigation of post-conviction relief. 28 U.S.C. § 2261(b) and (c). There is no indication that Tennessee has complied with 28 U.S.C. § 2261(b) and (c). *See Rahman v. Bell*, 927 F. Supp. 262, 266 (M.D. Tenn. 1996); *Austin v. Bell*, 927 F. Supp. 1058, 1061-62

II. REASONABLE DOUBT INSTRUCTION

The district court found that the reasonable doubt instruction was unconstitutional because it lowered the constitutional burden of proof of "beyond a reasonable doubt" by requiring merely "moral certainty" and by allowing the jury to base its verdict on something other than the prosecutor's proof. *Austin*, 938 F. Supp. at 1318-19. Warden Bell argues that the district court erred because the instruction does not lower the burden of proof to convict Austin. We find that Austin's claim is without merit.

To warrant habeas relief, jury instructions must not only have been erroneous, but also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Henderson v. Kibe* [sic], 431 U.S. 145, 154 (1977); *Wood v. Marshall*, 790 F.2d 548, 551-52 (6th Cir. 1986). If an instruction is ambiguous and not necessarily erroneous, it violates the Constitution only if there is a reasonable likelihood that the jury has applied the instruction improperly. *Estelle*, 502 U.S. at 72, 73 n.4; *Boyde*, 494 U.S. 370, 380 (1990).

Austin alleges that the following jury instruction violated his constitutional rights:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that

---

(M.D. Tenn. 1996). Therefore, the new review standards of 28 U.S.C. § 2254(d)(1)-(4), do not apply to this case.

> may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.

(J.A. at 320.) Austin argues that this "reasonable doubt" instruction is similar to the "reasonable doubt" instruction held to be unconstitutional in *Cage v. Louisiana*, 498 U.S. 39 (1991).[4] In *Cage*, the Supreme Court held that the instruction allowed a reasonable juror to find guilt based on a degree of proof below that required by the Constitution because it required a "moral certainty," rather than an "evidentiary certainty," that the defendant was guilty, and it suggested that jurors needed an "actual substantial

---

[4] In *Cage*, the jury was provided with the following "reasonable doubt" instruction:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty,* raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

Cage, 498 U.S. at 40.

doubt" or a "grave uncertainty," instead of a "reasonable doubt," to acquit. *Id.* at 40-42, 44.

In *Victor v. Nebraska*, 511 U.S. 1 (1994), however, the Supreme Court held that use of the term "moral certainty" does not, of itself, render a "reasonable doubt" instruction unconstitutional. The phrase "moral certainty" is constitutionally permissible where the rest of the instruction "lends content to the phrase," *Id.* at 14, and indicates the government's proper burden of proof. In *Victor*, the Court found the following language constitutional:

> "Reasonable doubt is defined as follows: It is not a *mere possible doubt;* because everything relating to human affairs, and *depending on moral evidence,* is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty,* of the truth of the charge."

Id. at 8. The Court recognized that an instruction which requires only that jurors be "morally certain" of a defendant's guilt impermissibly suggests "a standard of proof lower than due process requires or . . . conviction on factors other than the government's proof." *Id.* at 16. However, the Court found that the "abiding conviction" language, when used in conjunction with "moral certainty," properly stated the government's burden of proof. *Id.* at 15.

We find that the reasonable doubt instruction in this case is more like the acceptable language in *Victor* than

the unacceptable language in *Cage*. The language of an "inability to let the mind rest easily" lends content to the phrase "moral certainty" similar to the "abiding conviction" language in *Victor*, increasing, if anything, the prosecutor's burden of proof. It also does not create a reasonable likelihood that the jury applied the instruction in a way that would lower the state's burden of proof because it does not increase the measure of doubt beyond a "reasonable doubt."

III. INEFFECTIVE ASSISTANCE OF COUNSEL

The district court concluded that Austin received ineffective assistance of counsel during both the liability and sentencing phases of his trial because his attorney failed to conduct sufficient investigation, failed to file sufficient pretrial motions, failed to call critically important witnesses during the guilt phase of trial, and failed to present any evidence at sentencing. *Austin*, 938 F. Supp. at 1322-25. Warden Bell contends that the district court erred in finding ineffective assistance of counsel because even if defense counsel's performance was deficient, it did not prejudice Austin's defense, and was therefore not defective under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Court holds that even if Austin's trial counsel's performance was deficient, Austin has failed to show any actual prejudice to his defense in the liability phase of his trial. However, this Court holds that

Austin's trial counsel's performance during the sentencing phase was deficient and also prejudiced his defense because he presented no evidence.[5]

A. Liability Phase

Ineffective assistance of counsel occurs when an attorney's deficient performance prejudices the defense and renders the trial unfair and the result unreliable. *Strickland*, 466 U.S. at 687; *McQueen v. Scroggy*, 99 F.3d 1302, 1310-11 (6th Cir. 1996). Reviewing courts focus on whether counsel's errors have undermined the reliability of and confidence that the trial was fair and just. *Strickland*, 466 U.S. at 686; *United States v. Cronic*, 466 U.S. 648, 658 (1984); *McQueen*, 99 F.3d at 1311-12. To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Nix v. Whiteside*, 475 U.S. 157, 175 (1986); *McQueen*, 99 F.3d at 1311. The performance and prejudice components of the *Strickland* test are mixed questions of law and fact, which this Court reviews de novo. *Strickland*, 466 U.S. at 698; *McQueen*, 99 F.3d at 1310-11.

---

[5] Warden Bell also contends that the district court ignored the legal presumption of correctness of the state court's finding of effective assistance of counsel. However, that is a mixed issue of law and fact which this Court reviews de novo. *Sims v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992).

Review of defense counsel's performance is highly deferential, *Strickland*, 466 U.S. at 689. Courts presume that defense counsel has rendered adequate assistance by exercising reasonable professional judgment and sound trial strategy. *Id.* at 690; *accord McQueen*, 99 F.3d at 1311; *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994). However, a defense counsel's performance must be "reasonably likely to render . . . reasonably effective assistance." *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974). This requires a defense counsel to reasonably investigate the facts of the case or reasonably determine that an investigation is not necessary. Failure to do so is deficient performance. *Strickland*, 466 U.S. at 691; *O'Hara*, 24 F.3d at 828; *Workman v. Tate*, 957 F.2d 1339, 1345-46 (6th Cir. 1992).

Here Austin complains that Livingston interviewed only Blankenship and himself. However, Austin did not identify any other leads that Livingston should have investigated that would have reasonably resulted in a different verdict. Livingston also filed few pretrial motions. Nevertheless, Austin did not identify any specific pretrial motions that Livingston should have filed that reasonably would have resulted in a different verdict.

Austin challenges Livingston's failure to call Blankenship or Austin's wife to testify at trial. Austin argues that Livingston should have called Blankenship because Blankenship gave Livingston a statement that Austin did not hire him to kill Watkins. However, Austin has not demonstrated that Livingston's tactical decision not to call Blankenship because of Blankenship's credibility and reliability problems was unreasonable, that Blankenship

would have testified consistently at trial, or that Blankenship's uncertain testimony would have reasonably resulted in a different verdict.

Austin also maintains that Livingston should have called his wife to testify because: (1) she had as much reason as Austin to kill Watkins because Watkins would have testified against her also; and (2) she had a motive to implicate Austin in the murder because she was romantically involved with Casteel. However, Austin has not identified any evidence to this Court that his wife and Casteel hired Blankenship to kill Watkins or that they were romantically involved. Accordingly, Austin has failed to demonstrate that Livingston's conduct during the liability phase of the trial prejudiced his defense.

B. Sentencing Phase

Livingston's representation during the sentencing phase is a different story. We find that Livingston's failure to investigate and present any mitigating evidence during the sentencing phase so undermined the adversarial process that Austin's death sentence was not reliable.

The Eighth Amendment requires a jury to consider the circumstances of the crime and the defendant's background and character during the sentencing phase of a capital trial. *Boyde v. California*, 494 U.S. at 377-78; *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The Constitution also requires defense counsel to reasonably investigate a defendant's background and present it to the jury. Failure to investigate or present mitigating evidence at sentencing may constitute ineffective assistance of counsel. *Glenn*

v. Tate, 71 F.3d 1204, 1206-08 (6th Cir. 1995), *cert. denied*, 117 S. Ct. 273 (1996) (counsel provided ineffective assistance where information was not presented to jury at sentencing because counsel made virtually no attempt to prepare for sentencing phase).

In this case, Livingston did not present any mitigating evidence because he did not think that it would do any good. However, given that several of Austin's relatives, friends, death penalty experts, and a minister were available and willing to testify on his behalf, this reasoning does not reflect a strategic decision, but rather an abdication of advocacy. This Court finds that Livingston's failure to investigate or present any mitigating evidence undermined the adversarial process and rendered the death sentence unreliable. Accordingly, this Court finds that Austin received ineffective assistance of counsel at sentencing and will remand for retrial of the sentencing phase.

IV. UNANIMITY ON MITIGATING CIRCUMSTANCES

Because this Court has determined that this case should be remanded for resentencing, it need not decide whether the instruction on mitigating circumstances created a substantial possibility that the jury interpreted the instruction to prevent them from individually considering a mitigating circumstance unless they unanimously agreed on that circumstance. However, this Court has serious concerns that the instruction did just that. Therefore, we caution counsel that in resentencing Austin, each individual member of the capital jury must be able to

consider all mitigating evidence that Austin presents. *McKoy v. North Carolina*, 494 U.S. 433, 440-441 (1990); *Mills v. Maryland*, 486 U.S. 367 (1988); *Lockett v. Ohio*, 438 U.S. at 605; *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1108-10, 1120-21 (6th Cir. 1990) (en banc).

V. CONCLUSION

We **REVERSE** the district court as to the ineffective assistance of counsel during the liability phase of Austin's trial and the unconstitutionality of the reasonable doubt instruction. However, we **AFFIRM** the district court's finding of ineffective assistance of counsel at sentencing. Accordingly, we **REMAND** for retrial of the sentencing phase of Austin's trial.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RICHARD H. AUSTIN	]	
	]	No. 3:86-0293
v.	]	
	]	
RICKY BELL, Warden	]	

MEMORANDUM

[As Amended By April 29, 1996 Order]

Pending before the Court in the above-styled case is Petitioner's Motion for Summary Judgment (Doc. No. 146). Petitioner Austin asserts that there are no issues of material fact and that he is entitled to judgment as a matter of law. Petitioner moves this Court to issue the writ of habeas corpus unless the State grants him a new trial at which the State is required to prove its case beyond a reasonable doubt, the jury is required to decide the case on its factual merits, and Mr. Austin is sentenced in a manner consistent with the law.

For the reasons stated below, the Court partially grants Petitioner's motion for summary judgment. The Court grants Petitioner's motion with respect to his claims regarding constitutional defects in the jury instructions and ineffective assistance of counsel.

I. BACKGROUND

Petitioner Richard Austin was indicted and tried in October, 1977 under a two count indictment. Petitioner was charged with murder in the first degree and with acting as an accessory before the fact to the offense of murder in the first degree. The jury determined that Petitioner hired another man to kill Julian Watkins and that Petitioner was thus guilty as an accessory before the fact to murder in the first degree. The jury imposed the death penalty.

Petitioner asserts that he is entitled to summary judgment and a writ of habeas corpus with respect to six claims. First, Petitioner asserts that the false testimony of Terry Casteel and the state's failure to disclose that false testimony violated Petitioner's right to a fair trial and due process under the Sixth and Fourteenth Amendments. Second, Petitioner claims that he was denied his right to a fair trial and due process because the judge presiding over his murder trial had prosecuted him previously and demonstrated actual bias against him. Third, Petitioner argues that the jury instructions at his trial were defective and inadequate for two reasons: (a) the "reasonable doubt" jury instruction permitted the jury to find guilt based on an unconstitutionally small amount of proof; (b) the jury charge concerning unanimity was misleading to a constitutionally significant degree. Fourth, Petitioner claims that his attorney, Robert Livingston, rendered ineffective assistance of counsel in violation of Petitioner's rights under the Sixth and Fourteenth Amendments. Fifth, Petitioner argues that the Tennessee Supreme Court failed to engage in any meaningful

review of his death sentence for arbitrariness and disproportionality, violating Petitioner's Eighth and Fourteenth Amendment rights by leaving intact an unconstitutionally arbitrary and excessive sentence. Sixth, Petitioner claims that the trial court unconstitutionally engaged in "double counting," barred by *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), by using the same proof at the guilt stage of his trial as at the sentencing stage of his trial.

Based on a review of the record in the case and the evidentiary hearing, the Court rules in favor of Petitioner with respect to (1) Petitioner's claims regarding constitutional defects in the jury instructions and (2) Petitioner's claim of ineffective assistance of counsel. The Court rules against Petitioner with respect to (1) Petitioner's claim that the allegedly false testimony of Terry Casteel and the state's alleged failure to disclose it violated Petitioner's right to a fair trial and due process under the Sixth and Fourteenth Amendments; (2) Petitioner's claim that Judge Beasley was biased against Petitioner; (3) Petitioner's claim that the Tennessee Supreme Court failed to meaningfully review Petitioner's sentence for arbitrariness and disproportionality; and (4) Petitioner's claim that the trial court violated the principles set forth in *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992).

II. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides in part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Advisory Committee for the Federal Rules has noted that "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Notes on Rule 56, Federal Civil Judicial Procedure and Rules (West Ed. 1990).

An alleged factual dispute existing between the parties is not sufficient to defeat a properly supported summary judgment motion; there must be a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). The substantive law involved in the case will underscore which facts are material and only disputes over outcome determinative facts will bar a grant of summary judgment. *Id.*, 477 U.S. at 248, 106 S. Ct. at 2510.

While the moving party bears the initial burden of proof for its motion, the party that opposes the motion has the burden to come forth with sufficient proof to support its claim, particularly when that party has had an opportunity to conduct discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). It is true, however, that "[i]n ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." *Bohn*

Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427 (6th Cir. 1962) (citations omitted).

To determine if a summary judgment motion should be granted, the court should use the standard it would apply to a motion for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. *Anderson*, 477 U.S. at 250, 106 S. Ct. at 2511. The court must determine that a reasonable jury would be unable to return a verdict for the non-moving party in order to enter summary judgment. *Id.*, 477 U.S. at 249, 106 S. Ct. at 2511. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989) (citations omitted).

III. DISCUSSION

In construing the evidence in the light most favorable to the party opposing summary judgment, as required under *Bohn Aluminum & Brass Corp.*, 303 F.2d at 427, the Court finds that there are no genuine issues of material fact with respect to Petitioner's claims. For the reasons discussed below, the Court partially grants Petitioner's motion for summary judgment.

A. Terry Casteel's Testimony and the Alleged Violations of Petitioner's Sixth and Fourteenth Amendment Rights

The Court rejects Petitioner's claim that he was denied his Sixth and Fourteenth Amendment rights

because of false testimony by Terry Casteel and the State's failure to disclose that false testimony. Petitioner claims that the State failed to disclose evidence of a promise of leniency to Terry Casteel, failed to correct Mr. Casteel's false testimony regarding that promise of leniency, and failed to reveal to the defense a prior inconsistent statement that Mr. Casteel made to police investigators.

1. Alleged *Giglio* Violation

Petitioner claims that there was a secret "deal" or "deal to make a deal" between the State and Terry Casteel, which tainted Mr. Casteel's testimony and of which the jury was not informed. The existence of a deal would have violated the principles set forth in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Petitioner asserts that when Mr. Casteel denied the existence of such a deal at Mr. Austin's trial, Addendum 1, Vol. VII, at 492-93, Mr. Casteel committed perjury, and State should have corrected Mr. Casteel's misrepresentation. Petitioner cites to deposition testimony of Mr. Casteel, former Assistant District Attorney General Richard McNeese, former District Attorney General Hugh Stanton and others in support of his claim that a deal existed.

It is fundamental that the State may not use false testimony to obtain a conviction against a criminal defendant. *See Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935). The same prohibition exists when "the State, although not soliciting false testimony, allows it to go uncorrected

when it appears." *Giglio*, 405 U.S. at 153, 92 S.Ct. at 766 (quoting *Napaue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959)). *See Grosclose v. Bell*, No. 3:89-0662 (M.D. Tenn. April 5, 1995); *Rickman v. Dutton*, No. 3:85-0256 (M.D. Tenn. September 2, 1994). *See also Bragan v. Morgan*, 791 F.Supp. 704, 713 (M.D. Tenn. 1992) (relief available where witness, "although not technically committing perjury, left the jury with a materially false impression"). Moreover, if the State suppresses evidence favorable to an accused, due process is violated "where the evidence is material either to guilt or to punishment, irrespective of the good faith of [sic] bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963).

When a witness testifies against a co-defendant, evidence of any deal with the state is relevant to such witness' credibility and a jury is entitled to consider it. *See Campbell v. Reed*, 594 F.2d 4, 7 (4th Cir. 1979); *Brown v. Wainwright*, 785 F.2d 1457, 1465 (11th Cir. 1986) (jury entitled to consider "realities of what might induce a witness to testify falsely"). It makes no difference whether such an understanding is established by a wink, a nod and a handshake, or by a signed and notarized formal document. *Duggan v. State*, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989). Moreover, a co-defendant who testifies with only a reasonable expectation or understanding of leniency, but not a formal agreement, still has a powerful incentive to testify falsely in order to facilitate a conviction and curry favor with a prosecutor. *Campbell*, 594 F.2d at 7-8.

Where a conviction is obtained by the knowing use of perjured testimony, it is fundamentally unfair and must

be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976). It is appropriate for the court to issue a writ of habeas corpus in such circumstances unless the failure to disclose perjured testimony is harmless beyond a reasonable doubt. *United States v. Bagley*, 473 U.S. 667, 679-80, 105 S.Ct. 3375, 3382, 87 L.Ed.2d 481 (1985).

Utilizing the standards articulated above, the Court concludes that no "deal" existed in this case. The portions of Terry Casteel's deposition to which Petitioner cites regarding the alleged deal contain inconsistencies that diminish the credibility of that testimony. At some points in his deposition Mr. Casteel asserts that Assistant Attorney General Don Strother never mentioned a deal to him, and at other points he asserts that Mr. Strother did mention a deal. Deposition of Mr. Terry Casteel, June 23, 1995 ("Casteel Depo.") at 9-11, 26-27. Furthermore, Mr. Casteel, after reviewing his deposition testimony and documents regarding the trial of Mr. Austin, determined that his deposition had been incorrect and that there had been no deal between himself and the State. E.H. at 400. Mr. Casteel attributed his mistake at the deposition to his anxiety about the proceedings, the time lapse between Mr. Austin's trial and the deposition, and his insufficient preparation for the deposition. *Id.* at 398. Mr. Casteel then signed an affidavit in which he asserted that he had made no deal with the State prior to his testimony at Mr. Austin's criminal trial. Mr. Casteel also testified to this effect at the evidentiary hearing. Moreover, Mr. Casteel stated at the evidentiary hearing that he had received no

benefit from the State in exchange for signing the affidavit or for his testimony at the evidentiary hearing. *Id.* at 402.

At the evidentiary hearing Petitioner's counsel thoroughly cross-examined Mr. Casteel regarding the alleged deal and Mr. Casteel consistently maintained that no deal had existed. Mr. Casteel maintained that he had made an hones mistake in his deposition.

Mr. Casteel's testimony at the evidentiary hearing was supported by the testimony of Assistant Attorney General Richard McNeese, Attorney Ed Lenow, and Attorney Charles Wright. *See* E.H. at 16-17, 292-93, 314-317, 319-321, 332, 338-39, 342. It is also supported by the deposition testimony of Mr. Don Strother. Deposition of Don Strother, June 23, 1995, at 18-23, 51-52.

Based on the testimony at the evidentiary hearing and the Court's review of the record in this case, the Court concludes that there was no "deal" or "deal to make a deal" between the State and Terry Casteel prior to Mr. Austin's criminal trial. Therefore the State did not fail to disclose the existence of such a deal.

2. Alleged *Brady* Violation

In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." The standard of materiality to be applied in determining whether a conviction should be reversed because

the prosecutor failed to disclose requested evidence that could have been used to impeach Government witnesses is whether there is a reasonable probability that, had evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 87 L.Ed.2d 481, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Using this standard, this Court rejects Petitioner's claim that Respondents committed a *Brady* violation in this case. The Court finds no conclusive evidence that Respondents withheld from Petitioner Mr. Casteel's statement to law enforcement officials on July 6, 1977, in which Mr. Casteel denied any involvement in or knowledge of the murder of Julian Watkins, and which contradicted Mr. Casteel's trial testimony. Furthermore, the Court finds that based on Mr. Livingston's cross-examination of Mr. Casteel, Mr. Livingston appears to have known of the prior inconsistent statement and had the opportunity to use it to impeach Mr. Casteel's credibility. Addendum 1, Vol. VII, at 490-94. Accordingly, the Court finds that there was no *Brady* violation in this case.

The Court concludes that Petitioner suffered no violation of his rights based on the allegedly false testimony of Terry Casteel and the prosecution's alleged failure to reveal this false testimony. Thus the Court denies Petitioner's motion for summary judgment on these grounds.

B. Judge Beasley's Alleged Bias

The Petitioner asserts that he was denied his right to a fair trial and due process under the Sixth and

Fourteenth Amendments because of alleged bias against him by Judge Beasley, the judge who presided at his trial. In support of this claim Petitioner notes that prior to serving as the trial judge in Petitioner Austin's murder prosecution, Beasley worked as Assistant Attorney General and prosecuted the Petitioner for several crimes. Following a review of the evidence presented, the Court rejects Petitioner's argument.

Only a strong, direct interest in the outcome of a case is sufficient to overcome the presumption of judicial evenhandedness. *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1373 (7th Cir. 1994). In the Sixth Circuit case law establishes that a trial judge who previously prosecuted a defendant is not required to recuse himself from a later case involving that defendant unless there is actual bias or prejudice. *Corbett v. Bordenkircher*, 615 F.2d 722, 723 (6th Cir. 1980); *Jenkins v. Bordenkircher*, 611 F.2d 162 (6th Cir. 1979), *cert. denied* 466 U.S. 943, 100 S.Ct. 2196, 64 L.Ed.2d 798 (1980). Although some case law suggests that the due process clause requires a judge to recuse himself where there is no showing of actual bias but where a sufficient motive for bias exists, this Court concludes that no such motive existed in Mr. Austin's trial. *See Del Vecchio*, 31 F.3d at 1371. Where there is no showing of actual bias, the court will not assume that a state court judge would be unable to give a defendant a fair trial solely because he had earlier contact with the defendant in the course of prosecuting unreleated charges. *Jenkins*, 611 F.2d at 166.

Case law indicates that a defendant is not denied a fair trial solely because the presiding judge previously prosecuted the petitioner on unrelated charges. *Jenkins*,

611 F.2d at 166. The charge for which Judge Beasley previously prosecuted Mr. Austin was a larceny charge unrelated to this murder charge. Because the charges were unrelated, neither the fact that Judge Beasley was involved in both actions nor the fact that the larceny charge was considered as an aggravating circumstance in Petitioner's sentencing for murder deprived Petitioner of his constitutional rights.

Furthermore, there is substantial evidence that Judge Beasley harbored no bias against Mr. Austin. Judge Beasley attests to this in his affidavit. In addition, Judge Beasley states that he did not even recognize Mr. Austin until a third person reminded him of Mr. Austin's identity. Finally, Judge Beasley denied the State's motion to revoke bond in Mr. Austin's murder case and allowed Petitioner to remain free until trial. Based on this evidence, the Court concludes that Petitioner's allegations that Judge Beasley was biased against Petitioner lack merit. Accordingly, the Court denies Petitioner's motion for summary judgment with respect to this claim.

C. Alleged Defects in the Jury Instructions

As the Court noted in *Rickman v. Dutton*, 854 F.Supp 1305, 1310-12 (M.D. Tenn. 1994), the Tennessee Code created in the Defendant a protected liberty interest in having a jury impose his death sentence. Where the jury instructions are unconstitutional, the jury's weighing may be invalid unless harmless error doctrine applies. Where the error is not harmless, there must be a new sentencing because an effort by the appellate court to reweigh the evidence would violate Petitioner's due process rights.

Rickman, 854 F.Supp at 1312. The Court concludes that retrial [and] resentencing are necessary in the current action because two of the lower court's jury instructions were unconstitutional.

1. Reasonable Doubt Jury Instruction

The Constitution requires that guilt in a criminal trial be established beyond a reasonable doubt. Petitioner alleges that the reasonable doubt jury instruction given at the guilt phase of his trial violated the Sixth, Eighth, and Fourteenth Amendments because it allowed the jury to find guilt based on a lesser degree of proof than that required by the Constitution. *See Victor v. Nebraska*, ___ U.S. ___, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994); *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328 (1990); *Rickman v. Dutton*, 864 F.Supp 686 (M.D. Tenn. 1994).[1]

At Mr. Austin's trial, the court's jury instruction regarding reasonable doubt consisted of the following:

> In order to convict the defendant, Richard Austin, of the offense of Accessory Before the Fact to the Murder in the First Degree of Jilian C. Watkins, or some lesser included offense of that crime, you must find beyond a reasonable doubt and to a moral certainty that:
>
> 1) The crime of the murder in the First Degree of Jilian C. Watkins, or some lesser included offense of that crime, was in fact committed;
>
> 2) The crime of the Murder in the First Degree of Julian C. Watkins, or some lesser included

---

[1] The Court rejects Respondent's argument that Petitioner has defaulted this claim. *Rickman*, 864 F.Supp. at 707-708.

offense of that crime, was committed within the jurisdiction of this court, that is, in Shelby County Tennessee; and

3) The principal offenders Jack Charles Blankenship and/or Terry Lee Casteel actually committed the offense of the Murder in the First Degree of Julian C. Watkins or some lesser included offense of that crime, in such a manner that would make them guilty under the law of this State as read to you;

4) The defendant on trial before you, Richard Austin, did before the finding of this indictment, feloniously move, incite, counsel, hire, command or procure Jack Charles Blankenship and/or Terry Lee Casteel to commit the offense of Murder in the First Degree of Julian C. Watkins, or some lesser included offense of that crime, and is therefore guilty as an accessory before the fact. You cannot find the defendant, Richard Austin guilty as an accessory before the fact unless you first find beyond a reasonable doubt and to a moral certainty the principals, Jack Charles Blankenship and/or Terry Lee Casteel guilty of the offense of the Murder in the First Degree of Julian C. Watkins, or some lesser included offense of that crime.

Trial Tr. 1021-1022.

* * *

Reasonable Doubt: Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not

> mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.

Trial Tr. 1029.

The Court finds that this reasonable doubt jury instruction has the same impermissible impact as did the reasonable doubt instruction held to be unconstitutional in *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328 (1990).[2] In *Cage* the Supreme Court found that the reasonable doubt instruction violated the Constitution by requiring that the jury have a higher level of doubt than a "reasonable

---

[2] In *Cage* the reasonable doubt instruction stated the following:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*.

Cage, 498 U.S. at 40, 111 S.Ct. at 329 (emphasis in original).

doubt" in order to acquit the defendant. The same is true of the jury instructions at Petitioner's trial. In Mr. Austin's trial the "moral certainty" language combined with the "mind rest easy" language permitted a reasonable juror to find guilt based on a degree of proof below that required by the Constitution. *See Rickman v. Dutton*, 864 F.Supp. at 708-10.[3] An instruction that merely requires jurors to be "morally certain" of a defendant's guilt impermissibly suggests a standard of proof lower than due process requires or suggests that conviction may be based on factors other than the prosecution's proof. *Rickman*, 864 F.Supp at 709. This Court finds that unlike the case of *Victor v. Nebraska*, 114 S.Ct. 1239, 1247-48 (1994), in which the remainder of a jury instruction lent content to the phrase "moral certainty" rendering it constitutional, there was no component of the jury charge in Mr. Austin's trial that lent sufficient content to cure the deficient reasonable doubt instruction.

Moreover, the instruction in Mr. Austin's trial problematically defined "reasonable doubt" as "an inability

---

[3] The reasonable doubt jury instruction in *Rickman* stated the following:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.

Rickman, 864 F.Supp at 708.

after such investigation [of all the proof in the case] to let the mind rest easily upon the certainty of guilt." *Id.* The Court concludes that the "moral certainty" language[4] in conjunction with the "mind rest easily" language suggests to a reasonable juror a lower burden of proof than is required by the Constitution.[5]

For these reasons, the Court grants Petitioner's motion for summary judgment with respect to this claim.

2. The Jury Charge Concerning Unanimity

The Court concludes that Petitioner has not procedurally defaulted this claim. *Rickman v. Dutton*, 864 F.Supp. at 707-08.

Petitioner claims that his rights under the Eighth and Fourteenth Amendments were violated by the trial court's failure to instruct the jury regarding the effect of non-unanimity and the jury's option to recommend life imprisonment. Petitioner argues that this impermissibly swayed the jury in favor of imposing the death penalty.

In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the Supreme Court invalidated death sentencing procedures that were discretionary because

---

[4] The Court instructed the jury that "moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense." Trial Tr. 1029.

[5] Furthermore, this flaw in the jury instructions is not subject to harmless error review. *Sullivan v. Louisiana*, 113 S.Ct. 2079, 2082 (1993).

they imposed capitol sentences in an arbitrary and unintelligle way. *See Id.* at 249-51, 92 S. Ct. at 2731-32 (Douglas, J.); *Id.* at 293, 92 S. Ct. at 2754 (Brennan, J.); *Id.* at 364, 92 S. Ct. at 2762 (Stewart, J.); *Id.* at 311-13, 92 S. Ct. at 2763-64 (White, J.); *Id.* at 364, 92 S. Ct. at 2790 (Marshall, J). The Constitution requires states to adhere to specific standards when imposing a death sentence. First, a state must avoid the "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury." *Godfrey v. Georgia*, 446 U.S. at 429, 100 S. Ct. at 1765. A jury that has the responsibility for determining whether or not to impose a death sentence must be properly instructed as to all aspects of the sentencing process. *Walton v. Arizona*, 497 U.S. at 653, 110 S. Ct. at 3057.

Second, sentencing procedures must be such that the death penalty will only be imposed on basis of rational criteria, such as retribution and deterrence, and not on the basis of whim, mistake, bias, or other irrelevant factors. *See e.g., Beck v. Alabama*, 447 U.S. 625, 637-38, 642-43, 100 S. Ct. 2382, 2389-90, 2392, 65 L. Ed. 2d 392 (1980) (invalidating charge instructing jurors to choose between convicting defendants of the most serious crime or acquitting them of any crime because it increased the risk that the death sentence would be imposed inaccurately); *Caldwell v. Mississippi*, 472 U.S. 320, 331, 333, 105 S. Ct. 2633, 2641, 2641-42, 86 L. Ed. 2d 231 (1985) (reasoning that a charge that misinformed a jury that there was automatic review of death verdicts created a risk of inaccurate death sentences by allowing the jury to believe it could err and be corrected on appeal).

Third, juries that have the power to impose the death penalty must be informed of and consider any mitigating evidence that the defense offers. *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S. Ct. 2954, 2964-65, 57 L. Ed. 2d 973 (1978). This rule forbids restrictions on the introduction of mitigating evidence and prohibits instructions that would prevent jurors from assessing mitigating circumstances unless all twelve jurors unanimously agreed that such factors were present. *Mills v. Maryland*, 486 U.S. 356, 384, 108 S. Ct. 1860, 1870, 100 L. Ed. 2d 384 (1988). It would be impermissibly arbitrary to allow or to require that the death penalty be imposed because one juror was able to prevent the other eleven from considering mitigating evidence. *McKoy v. North Carolina*, 494 U.S. 433, 440-41, 110 S. Ct. 1227, 1232 (1990).

The standard of review of a disputed jury instruction is " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, ___ U.S. ___, ___, 112 S. Ct. 475, 482, 116 L. Ed. 2d 385 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316 (1990)). In both *Estelle* and *Boyde*, the Supreme Court was reviewing an "ambiguous" instruction. At Mr. Austin's trial, the charge was both ambiguous and erroneous because it misstated the relevant law. Applying the *Boyde* standard, this Court finds that it was reasonably likely that the jury in Mr. Austin's case applied the charge in an unconstitutional manner.

It was reasonably likely from the charge and the verdict form provided in Petitioner's case that the jury believed it could not consider mitigating circumstances unless the jury was unanimous as to the existence of such

circumstances. This violates the principles set forth in *Mills v. Maryland*, 486 U.S. 356, 384, 108 S. Ct. 1860, 1870, 100 L. Ed. 2d 384 (1988). Because the Court finds that the jurors were precluded from weighing "factors which may [have] call[ed] for a less severe penalty," *Lockett*, 438 U.S. at 605, 98 S. Ct. at 2965, Mr. Austin's sentence cannot stand. Further, the Court finds that it cannot rule out the "substantial possibility that the jury may have rested its verdict on [an] 'improper' ground", *Mills*, 486 U.S. at 377, 108 S.Ct. at 1867 (footnote omitted). For these reasons as well the Court must remand for resentencing.

The capital-sentencing scheme in effect at the time of Mr. Austin's trial, Tennessee Code Annotated Section 39-2404, directed "the trial judge [to] include in [the] instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances . . . which may be raised by the evidence." Tenn. Code Ann. § 39-2404(e).[6] The jury may reach a sentence in one of the following ways:

1. If the jury unanimously determines that . . . statutory aggravating circumstances have been proved by the state . . . and said . . . circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. Tenn. Code Ann. § 39-2404(g).

2. If the jury unanimously determines that no statutory aggravating circumstances have been proved

---

[6] Tennessee's capital sentencing statute has been recodified. The subsections cited here generally correspond to Tennessee Code Annotated Section 39-13-204 (1991).

> by the state . . . or if the jury unanimously determines that . . . statutory aggravating circumstances have been proved . . . but . . . are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. Tenn. Code Ann. § 39-2404(f).
>
> 3. If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and. . . impose a sentence of life imprisonment. Tenn. Code Ann. § 39-2404(h).

The latter provision indicates that each juror can individually assess the circumstances and compel a sentence less than death.

These statutory provisions stand in contrast to the actual charge given at Mr. Austin's trial:

> If you unanimously determine that no statutory aggravating circumstance has been proved to the State beyond a reasonable doubt; or if the jury unanimously determine that statutory aggravating circumstance or circumstances have been proven by the State beyond a reasonable doubt; but that said statutory aggravating circumstance or circumstances are outweighed by one or more mitigating circumstance, the sentence shall be life imprisonment. You will write your verdict upon the enclosed form attached hereto and made a part of this charge.
>
> This verdict should be as follows: "We, the jury, unanimously find that the punishment shall be life imprisonment"
>
> The verdict must be unanimous and signed by each juror. The jury in no case should have any sympathy or prejudice. . . .

The forms are as follows: Punishment of Life Imprisonment:

"We, the jury, unanimously find that the punishment shall be life imprisonment . . . "

(1) We, the jury, find unanimously – or we, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances. There are blank spaces for the listing, if so found.

(2) We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we, the jury, unanimously find that the punishment for the defendant shall be death. . . .

Trial Tr. 1135-1138.

The jury's verdict suggested that the jury may have mistakenly believed that their verdict had to be unanimous. The verdict was as follows:

We the jury unanimously find the following list of statutory aggravating circumstance or circumstances.

4. The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.

2. We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

> Therefore, we, the jury, unanimously find that the punishment for the defendant, Richard Austin, shall be death. . . .

Trial Tr. 1139.

The Court finds it reasonably likely that the jury in Mr. Austin's case interpreted the instructions as preventing any juror from considering mitigating circumstances unless the jury unanimously agreed as to that circumstance. Hence, resentencing is necessary. *See Mills*, 486 U.S. at 384, 108 S. Ct. at 1870 (requiring resentencing where petitioner's jury may have arrived at a death verdict improperly).

The instructions at Mr. Austin's trial violated the second and third Eighth Amendment rules adopted by the Supreme Court after *Furman*. The Constitution prohibits the irrational favoring of a death penalty sentence that occurs where a court fails to instruct on the jurors' ability to disagree and impose a sentence of life imprisonment if at least one juror favors that outcome. *See Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). In *Beck* it was constitutional error to base a capital conviction and sentence on a determination by a jury that impermissibly believed that its only alternative was to acquit a guilty offender. *Id.* at 630, 637, 100 S. Ct. at 2386, 2389. Similarly, in Petitioner's case, it was constitutionally impermissible for the jury to impose the death penalty where the jury was falsely led to believe that a failure to arrive at a unanimous decision would prevent the jury from carrying out its duty. The effect in Mr. Austin's case was to eliminate the possibility of a sentence of life imprisonment unless there was unanimity, which is not required by Tennessee's capital sentencing

statute, and which irrationally favors the imposition of the death sentence.

The instructions in Mr. Austin's case also unconstitutionally precluded the jurors from considering any mitigating evidence unless all twelve jurors agreed on the existence of a particular circumstance. *Mills*, 486 U.S. at 384, 108 S. Ct. at 1870. The case of *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990), *cert. denied*, 499 U.S. 970, 111 S. Ct. 1608, 113 L. Ed. 2d 669 (1991), is controlling here. In that case habeas corpus relief was granted because the trial court had failed to instruct the jurors explicitly that they "need not be unanimous with regard to mitigating factors." *Id.* at 1108. The Supreme Court concluded that without this charge, jurors might assume that they could not give weight to mitigating circumstances unless the other eleven jurors agreed. *Id.* at 1110. A death sentence imposed in the absence of instructions authorizing non-unanimity on mitigating factors is unconstitutional:

> Because juries are likely to act as a unit in sentencing, . . . the danger of a tainted sentence [is] high where jurors are "never expressly informed in plain and simple language that even if one juror believed that the death penalty should not be imposed, [petitioner] would not be sentenced to death. . . . "
>
> Because the jurors in this case were told that aggravating factors had to be unanimous, but were not told exactly what role mitigating factors play, it would have been reasonable for them to assume that mitigating factors had to be found unanimously as well.

Id. at 1109-10 (quoting *Kubat v. Thieret*, 867 F.2d 351, 373 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 206, 107 L. Ed. 2d 159 (1989)).

Had the jury in *Kordenbrock* understood that one juror could have blocked the death sentence the court could be more certain that the "jur[y] carr[ied] out [its] role[ ] properly." *Id.* at 1110. Similarly, the jury in Mr. Austin's case was not informed of the effect of non-unanimity. The trial court's failure to inform jurors that they could individually consider mitigating circumstances left uncertainty as to the propriety of the imposition of the death penalty. Even worse, the jurors were instructed that they had to find mitigating factors unanimously and that the verdict had to be unanimous as to the imposition of a death sentence or a sentence of life imprisonment.

By misinforming the jury about state law the trial judge impermissibly swayed deliberations in favor of death and forbade individual jurors from considering mitigating factors unless all twelve jurors agreed on their existence and weight. Consequently, the Court finds that the instructions at Mr. Austin's trial violated the Eighth and Fourteenth Amendments and grants Petitioner's summary judgment motion with respect to this issue.

D. Ineffective Assistant of Counsel Claim

The Court concludes that Petitioner has not procedurally defaulted this claim. *Rickman v. Dutton*, 864 F. Supp. at 707-08.

The Court concludes that Petitioner received ineffective assistance of counsel in violation of the Sixth and

Fourteenth Amendments. The Court finds that attorney Robert Livingston failed to conduct sufficient investigation, failed to file sufficient pretrial motions, failed to present evidence at sentencing, and failed to call critically important witnesses during the guilt phase of trial.

With respect to investigation, the only action that Mr. Livingston took in representing Petitioner was to interview Jack Charles Blankenship, the man who plead guilty to killing Julian Watkins. Based on this interview Mr. Livingston got an admission from Mr. Blankenship that Petitioner Austin was not involved in the crime. However, Mr. Livingston did not call Blankenship as a witness at trial to testify regarding Petitioner's innocence despite Petitioner's request that Mr. Livingston do so. Richard Austin Affidavit ("Austin Affidavit"), para. 13; Deposition of Jack Charles Blankenship ("Blankenship Depo.") July 5, 1995 at p. 5. In addition, Mr. Livingston refused to interview other witnesses in this case despite the fact that Petitioner located several potential witnesses and gave Mr. Livingston their addresses. Mr. Livingston also refused to interview any of Petitioner's family members and refused to call them as witnesses. Furthermore, Mr. Livingston never interviewed Petitioner about the facts of the case prior to the time he advised Petitioner to take the witness stand. Austin Affidavit, para. 14.

Mr. Livingston failed to file any pretrial motions. This is particularly surprising given that this was the first death penalty case tried in Tennessee under the new death penalty law. Mr. Livingston also failed to object to misleading and constitutionally deficient aspects of the jury instructions.

Mr. Livingston did not present any evidence at the sentencing hearing. This is shocking because the sentencing phase of a death penalty trial is designed to allow the defendant an opportunity to present mitigating and humanizing evidence. However at Petitioner's sentencing hearing, Mr. Livingston did not present any evidence regarding Petitioner's personal background, relationships to friends and family, or mental or physical health. Mr. Livingston made this decision despite the existence of numerous witnesses who indicated at the evidentiary hearing that they had wished to testify.

Mr. Livingston's actions undoubtedly caused prejudice to Petitioner. This was a closely decided case where the jury acquitted Petitioner of first degree murder under count one and rejected three out of the four aggravating factors sought by the prosecutors. If Mr. Livingston had properly investigated and prepared the case, he would have called multiple witnesses who were friends, employees, or associates of Petitioner, or who were religious leaders. Deposition of Richard Austin ("Austin Depo.") at 23-31. Mr. Livingston's failure to call witnesses was particularly problematic at the sentencing phase of trial.

Finally, Mr. Livingston should have interviewed Mr. Austin and prepared him to testify before Mr. Livingston called him to the stand during the guilt phase of the trial. Austin Depo. p. 56.[7]

---

[7] The Court notes that Mr. Livingston has previously been judicially determined to have rendered ineffective assistance of counsel in the cases of *United States v. Goodwin*, 531 F.2d 347 (6th Cir. 1976) and *Ronald E. Rickman v. Michael Dutton*, 864 F.Supp. 686 (M.D. Tenn. 1994).

The benchmark for assessing any claim of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984). In order to succeed in a claim of ineffective assistance of counsel, a defendant must satisfy a two-pronged analysis by demonstrating:

(1) that counsel's performance fell below an objective standard of reasonableness; *Id.* at 687, and

(2) that there is a reasonable probability that, but for the trial attorney's errors, the result of the proceeding would have been different. *Id.* at 692.

This Court, in assessing the trial attorney's performance, must determine whether the attorney's assistance was reasonable considering all the circumstances. *Id.* at 688. This Court must decide whether, in light of all of the circumstances, the trial counsel's actions and omissions exceeded the range of professionally competent assistance. *Id.* at 690.[8]

The prejudice element in *Strickland's* second prong requires a defendant to show that the particular errors were unreasonable and had an adverse effect on the defense. *Id.* at 693. In order to show prejudice a defendant must show " . . . that there is a reasonable probability

---

[8] The Court notes that some individual errors can so unbalance the proceedings that "the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is "a probability sufficient to undermine confidence in the outcome . . . " *Id.* at 694. The guiding principle of the courts in considering ineffectiveness of counsel claims is whether, despite a presumption of reliability, the result of a particular proceeding is probably unreliable due to a deficiency in the adversarial process. *Id.* at 696.

Strickland's prejudice element may sometimes be presumed. Prejudice is legally presumed when the assistance of counsel has been altogether actually or constructively denied. *Id.* at 692; *Powell v. Alabama,* 287 U.S. 45, 56 (1932). The court may presume prejudice exists where various kinds of state interference with counsel's assistant have occurred. *Id.* Where defense counsel fails to subject the prosecution's case to meaningful adversarial testing the court may presume prejudice exists. *United States v. Cronic,* 466 U.S. 648, 659 (1984). The presumption of prejudice is also justified in circumstances where the prejudice is so likely that a case by case inquiry into the alleged prejudice is not feasible. *Strickland,* 466 U.S. at 692.

The Sixth Amendment and Fourteenth Amendment requirements of effective assistance of counsel also apply to the penalty phase of trial. *Strickland,* 466 U.S. at 687. Courts are particularly cautious in preserving a defendant's right to effective assistance of counsel at a capital sentencing hearing. *See, e.g., Kubat v. Thieret,* 867 F.2d 351, 367 (7th Cir. 1989), *cert. denied,* 110 S.Ct. 206 (1989); *Harris v. Dugger,* 874 F.2d 756, 763 (11th Cir. 1989), *cert. denied,* 110 S.Ct. 573 (1989). *Strickland's* second prong requires a showing that the death sentence resulted from " . . . a

breakdown in the adversarial process that rendered the result unreliable." *Id.* The unprofessional acts or omissions of counsel must be identified by the petitioner unless there is a presumption of prejudice. *Id.* at 690.

In order to assess the reasonableness of an attorney's decision whether or not to investigate certain aspects of a case or to present mitigating evidence the court must consider all of the surrounding circumstances. *Id.* at 691; *Kimmelman v. Morrison,* 477 U.S. 365 (1986) (holding that the trial attorney's failure to conduct pre-trial discovery and resulting failure to file a motion to suppress evidence was unreasonable and fell below prevailing professional norms.)

The Supreme Court has stated repeatedly that the pretrial phase of a criminal defense is "perhaps the most critical period of the proceedings," a time when "consultation, thorough-going investigation and preparation are vitally important." *Powell v. Alabama,* 287 U.S. 45, 57 (1932); *accord e.g., Von Moltke v. Gillies,* 332 U.S. 708 (1948). As any trial attorney knows, "a purported trial without adequate pretrial preparation amounts to no trial at all." *Brooks v. Texas,* 381 F.2d 619, 624 (5th Cir. 1967).

Counsel has the duty to interview potential witnesses and to make independent examination of the factual circumstances in the case. *Rummell v. Estelle,* 590 F.2d 103 (5th Cir. 1979); *Bell v. Georgia,* 554 F.2d 1360 (5th Cir. 1977) (granting habeas petition based on defense counsel's failure to make "any effort to contact" critical witnesses or "otherwise undertake any independent investigation.")

Counsel's duties at the penalty phase of trial must be considered in light of the United States Supreme Court

holding that "in capital cases it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of the defendant prior to the imposition of the death sentence." *Gregg v. Georgia,* 428 U.S. 153, 189 n.38 (1976). *See also, Glenn v. Tate,* 1995 FED App. 0373P, No. 93-3568 (6th Cir. Dec. 21, 1995).

It is defense counsel's responsibility to insure that mitigating considerations are presented to the sentencing authority. A substantial failure to offer such information plainly constitutes ineffective assistance of counsel. *See Mason v. Balcom,* 531 F.2d 717 (5th Cir. 1976); *United States v. Pinkney,* 551 F.2d 1241 (D.C. Cir. 1976).

Even in non-capital cases, counsel has a constitutional obligation to present evidence to the sentencing authority of all relevant mitigating circumstances such as the background and character of the defendant. Counsel has the duty to interview potential witnesses and to make an independent examination of the factual circumstances involved. *Rummell v. Estelle,* 590 F.2d 103 (5th Cir. 1979).

Based on the facts and circumstances of the current action, the Court finds that Petitioner received ineffective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights. Mr. Livingston failed to conduct sufficient investigation, failed to prepare, failed to present evidence, failed to make necessary motions, and failed to function as a meaningful adversary to the government. Were it not for Mr. Livingston's failings, the Court concludes there is a reasonable probability that the case would have been decided differently. At a minimum, the Court finds that there is a strong probability that Mr.

Austin would not have been sentenced to death. *See Rickman v. Dutton*, No. 3:85-0256 (M.D. Tenn. Sept. 2, 1994). Accordingly, the Court grants Petitioner's motion for summary judgment on this claim.

E. Allegedly Insufficient Review for Arbitrariness and Disproportionality

The Court determines that the Tennessee Supreme Court's review of Petitioner's death sentence for arbitrariness and disproportionality was sufficient under the Eighth and Fourteenth Amendments.

Petitioner argues that in the current action the Tennessee Supreme Court affirmed Mr. Austin's death sentence on direct appeal without engaging in sufficient review to determine whether (1) Petitioner's death sentence was excessive and disproportionate; (2) whether the outcome of jury deliberations was tainted by arbitrariness, caprice and prejudice; or (3) whether there was evidentiary support for the jury's aggravating and mitigating circumstance conclusions. The Petitioner also objects to the fact that Mr. Austin was not given notice of or an opportunity to be heard during the court's review of his sentence.

The Court notes that a state may inflict the death penalty without violating the Eighth Amendment so long as the class of crimes for which the death penalty may be imposed is narrow, the sentencer's discretion is limited, and the punishment is not excessive. A punishment is not excessive if it involves no unnecessary and wanton infliction of pain and if it is not grossly out of proportion to

the severity of the crime. *Gregg v. Georgia*, 428 U.S. 153, 168-88, 96 S.Ct. 2909 (1976).

In Tennessee, first-degree murder cases are handled through a bifurcated system. At the sentencing phase the jury may only impose the death penalty upon finding that one or more statutory aggravating circumstances are present. The jury must also find that mitigating circumstances do not outweigh aggravating circumstances. The jury must put its separate determinations in writing so that the trial judge can ascertain whether the jury has undertaken the correct analysis in selecting a death sentence. These procedural prerequisites to imposing the death penalty comport with the mandate of *Gregg*, 428 U.S. at 191-98, 96 S.Ct. at 2933. The Court also notes that the Tennessee death penalty statute has been upheld against constitutional challenge. *See, e.g., Barber v. State*, 889 S.W.2d 185 (Tenn. 1994); *State v. Nichols*, 877 S.W.2d 722 (Tenn. 1994).

At the time that Petitioner's case was before the Tennessee Supreme Court, the Tennessee Death Penalty Act required the court to determine on its automatic review of each sentence whether (1) the death sentence was imposed in an arbitrary fashion; (2) the evidence supported the jury's finding of aggravating circumstances; (3) the evidence supported the findings of insufficient mitigating circumstances; (4) the sentence of death was excessive or disproportionate to the penalty imposed in similar cases considering both the nature of the crime and the defendant. Tenn. Code Ann. § 39-2-205(c). In *State v. Austin*, 618 S.W.2d 738 (1981), the Court applied this standard and concluded that the sentence was neither

unconstitutionally arbitrary nor disproportionate. *Austin*, 618 S.W.2d at 741-42.

It is noteworthy that the Eighth Amendment does not require that a death sentence receive proportionality review. *Pulley v. Harris*, 465 U.S. 37, 44, 104 S.Ct. 871, 876 (1984). Therefore there is no violation in this case upon which the Court may grant federal habeas corpus relief under 28 U.S.C. § 2254(a).

In terms of proportionality review of Petitioner's sentence, there are some disparities in the imposition of the death penalty in Tennessee, but the Supreme Court has found that such disparities do not create Eighth Amendment problems. *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756 (1987). The Court finds that the sentence imposed on Mr. Austin is not disproportionate. *See Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 2932 (1976). Based on the distinctions between Defendants in the current matter, the fact that one jury imposed the death penalty on a defendant found to have contracted for an assassination (Mr. Austin) and another jury imposed a life sentence on a defendant found to have actually killed the victim (Mr. Blankenship) does not constitute unconstitutionally disproportionate sentencing.

The Court also concludes that Petitioner suffered no violation of his substantive due process rights when he received no notice of or opportunity to be heard during the Tennessee Supreme Court's review of his death sentence for arbitrariness and disproportionality. The Court acknowledges that Petitioner has a protected liberty interest in receiving a sentence that is neither arbitrary nor disproportionate, but the Court finds that the amount

of process that the [sic] Mr. Austin received in this case was sufficient. The state court found all the necessary facts to support the view that the sentence was neither arbitrary nor excessive.

For these reasons, the Court denies Petitioner's motion for summary judgment on this claim.

F. *Middlebrooks* Claim

Petitioner argues that the decision to allow the use of the same proof to establish Petitioner's guilt as an accessory before the fact, *see* Tenn. Code Ann. § 39-107 (repealed 1989), and to establish the aggravating circumstance that Mr. Austin hired another person to kill Julian Watkins, *see* Tenn. Code Ann. § 39-2404(i)(4), violated Petitioner's Eighth and Fourteenth Amendment rights. Petitioner claims that this constituted impermissible "double-counting" under the decision of *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992).[9] The Court rejects this argument for two reasons.

First, despite Petitioner's invocation of the Eighth and Fourteenth Amendments, Petitioner's allegation of a *Middlebrooks* violation fails to present a cognizable federal claim. Despite the Tennessee Supreme Court's discussion

---

[9] The court in *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), held that when a defendant is convicted of first-degree murder solely on the basis of felony-murder, the aggravating circumstance of felony-murder does not narrow the class of death eligible murderers sufficiently to satisfy the Eighth Amendment and the Tennessee Constitution. Therefore the aggravating circumstance is unconstitutionally applied where the death penalty is imposed upon conviction of felony-murder.

of the Eighth Amendment in *Middlebrooks*, the ultimate holding in that case rested solely on state constitutional grounds. *State v. Howell*, 868 S.W. 2d 238, 259 n.7 (Tenn. 1993). Furthermore, *Middlebrooks* is not dispositive of the federal constitutional perspective on the issue of double counting. *See Lowenfield v. Phelps*, 484 U.S. 231, 241, 108 S.Ct. 546, 553, 98 L.Ed.2d 568, *reh'g denied*, 485 U.S. 1126, 108 S.Ct. 1126, 99 L.Ed.2d 286 (1988). Therefore, if this Court were to grant Petitioner relief on Eighth Amendment grounds, the Court would violate the principle set forth in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), which prohibits the use of federal habeas corpus to create or announce a new constitutional rule.

Second, Petitioner's *Middlebrooks* argument is flawed because Petitioner's claim is not a *Middlebrooks* issue. In *Middlebrooks*, the Tennessee Supreme Court held that, when a defendant is convicted of felony murder, the felony murder aggravating circumstance does not narrow the class of death-eligible defendants if it *exactly* duplicates the elements of the offense supporting the conviction that make the defendant eligible for the death penalty. *State v. Stephenson*, 878 S.W.2d 530, 557 (Tenn. 1994). In the current action, as in *Stephenson*, Petitioner was convicted based on his criminal responsibility for another person's conduct. According to the law in effect at the time of Julian Watkins' murder, an accessory before the fact was deemed a principle offender and punished as such. *See* Tenn. Code Ann. §39-108 (repealed 1989). Because not every defendant who is guilty of first-degree murder pursuant to the criminal responsibility statute has

also hired another person to commit the murder, however, the aggravating circumstance that Petitioner's jury found did narrow the class of death-eligible defendants in accordance with *Middlebrooks*. *Stephenson*, 878 S.W.2d at 557. Therefore, the aggravating circumstance that Petitioner's jury found did narrow the class of death-eligible defendants in accordance with *Middlebrooks*. For these reasons, the Court denies Petitioner's motion for summary judgment with respect to this claim.

IV. CONCLUSION

In entering a judgment for Petitioner, the Court finds that Mr. Austin has prevailed on two of his claims as a matter of law. The Court finds that constitutional infirmities existed both at the guilt and sentencing phases of Mr. Austin's trial. For the reasons set forth above, the Court grants Mr. Austin's Motion for Summary Judgment with respect to his claims regarding constitutionally defective jury instructions and ineffective assistance of counsel.

Accordingly, the Court vacates Petitioner's death sentence. Further, the writ of habeas corpus shall issue, unless within 120 days from the entry of this order the State affords Mr. Austin a new trial.

An Order consistent with the foregoing reasoning will be entered contemporaneously with this Memorandum.

Entered this the 26th day of January, 1996.

/s/ John T. Nixon
JOHN T. NIXON,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RICHARD H. AUSTIN	]	
	]	No. 3:86-0293
v.	]	
	]	
RICKY BELL, Warden	]	

ORDER

[As Amended By April 29, 1996 Order]

Pending before the Court in the above-styled case is Petitioner's Motion for Summary Judgment (Doc. No. 146).

In accordance with the reasoning set forth in the contemporaneously entered Memorandum, the Court hereby partially GRANTS the Motion. The Court GRANTS Petitioner's Motion with respect to his claims regarding constitutionally defective jury instructions and ineffective assistance of counsel.

The Court VACATES Petitioner's conviction and death sentence. Further, the writ of habeas corpus shall ISSUE, unless within 120 days from the entry of this order the State affords Mr. Austin a new trial.

Entered this the 26th day of January, 1996.

/s/ John T. Nixon
JOHN T. NIXON,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RICHARD H. AUSTIN	]	
v.	]	No. 3:86-0293
	]	
RICKY BELL, Warden	]	

MEMORANDUM

Pending before the Court in the above-styled action are Petitioner's remaining arguments for habeas corpus relief. The Court has already granted Petitioner habeas corpus relief based on three arguments that Petitioner raised in his Motion for Summary Judgment.[1] The Court now considers the remaining claims in Petitioner's Amended Habeas Corpus Petition (Doc. No. 64). The Court considers the following issues:

1. The constitutionality of the jury's instruction regarding "heinous, atrocious or cruel aggravating circumstances" under Tenn. Code Ann. § 39-2404(i)(5) (1977);

2. The allegedly misleading premeditation instruction;

3. Jury instructions regarding how to weigh aggravating and mitigating circumstances;

4. The absence of written findings regarding mitigating circumstances;

---

[1] In its Order entered on January 1, 1996 (Doc. No. 206), the Court granted Petitioner habeas relief based on his claims regarding ineffective assistance of counsel and defective reasonable doubt and unanimity jury instructions.

5. The requirement that the sentence "shall be death;"
6. The alleged shift of the burden of proving mitigating circumstances;
7. The prosecution's allegedly improper final argument at the sentencing phase;
8. Whether Tenn. Code Ann. § 39-2404 allows the jury to accord too little weight to nonstatutory mitigating factors;
9. Whether Tenn. Code Ann. § 39-2404 improperly fails to require that the jury be told it can impose a life sentence out of mercy;
10. Whether there is an insufficient narrowing of the death eligible population;
11. Whether the death penalty in Tennessee is administered in an unconstitutionally inconsistent manner;
12. Whether the state post-conviction statute of limitations is an *ex post facto* law and violates due process;
13. Alleged prosecutorial vindictiveness;
14. The prosecution's alleged failure to provide notice of aggravating circumstances;
15. Whether the Tennessee Death Penalty Act improperly allows evidence otherwise inadmissible under the rules of evidence to be introduced at sentencing;
16. Whether Tennessee's bifuracted sentencing procedure violates double jeopardy prohibitions;
17. Alleged *Sandstrom v. Montana* and *Francis v. Franklin* violations;
18. Whether the death penalty, as administered in Tennessee, is cruel and unusual punishment;
19. Allegedly improper use of Petitioner's prior convictions;

20. Whether the prosecution improperly sought to diminish the jury's responsibility for imposing a sentence through improper argument;

21. Whether the prosecution improperly argued victim impact evidence;

22. Whether the "death qualification" of Petitioner's jury violated constitutional standards.

Upon review of Petitioner's remaining claims for habeas corpus relief the Court finds that none of these claims warrant such relief.

I. Analysis

At the outset, the Court determines that the provisions of the recently enacted Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, ch. 154, § 107, 110 Stat. 1214, 1221-26 ("the Act"), do not apply to Petitioner's claims. The Court bases this conclusion on two factors.

First, the language of the statute itself indicates that the statute does not take effect until Tennessee establishes procedures for ensuring that indigent prisoners seeking habeas relief in capital cases receive competent assistance of counsel during state post-conviction review. Section 2261(b) of the Act provides as follows:

> This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been

> upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. *The rule of court or statute must provide standards of competency for the appointment of such counsel.*

(emphasis added).

Although Tennessee provides for the appointment of counsel for indigent defendants, §§ 8-14-205, 40-14-202, 40-30-121, and has standards for determining whether appointed counsel has sufficiently performed, *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975), Tennessee imposes insufficient standards to ensure that only qualified, competent counsel will be appointed to represent habeas petitioners in capital cases. The current standard for assuring the quality of appointed counsel requires that an appointed attorney be, at a minimum, "a competent attorney licensed in this state." Tenn. Code Ann. § 40-14-202. That an attorney has passed the Tennessee bar examination does not mean that the attorney is competent to handle a habeas petition in a capital case.

It is crucial under the Act that only qualified attorneys be appointed to represent habeas petitioners in capital cases because the Act does not permit the ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings to be grounds for relief in a proceeding arising under section 2254. Instead, such incompetence may only result in the appointment of different counsel on the motion of the state or the petitioner. § 2261(e).

Although Tennessee law provides for the appointment of counsel for indigent prisoners seeking habeas

relief, this law insufficiently ensures the competency of such counsel. Based on the language of § 2261(b) of the Act, the Court concludes that this portion of the Act will not apply to Tennessee capital cases until the state satisfies the prerequisite set forth in § 2261(b).

In addition, the language of § 2262 of the Act indicates that for reasons for judicial economy, the Act should not construed to apply to cases that are currently the subject of evidentiary hearings in federal district court. Section 2262 provides as follows:

> (a) Upon the entry in the appropriate State court of record of an order under Section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.
>
> (b) A stay of execution granted pursuant to subsection (a) shall expire if (1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263 . . .

This language suggests that once the Act is implemented, a prisoner at any stage of the habeas review process may recommence the review process by filing a new habeas corpus application. Such an application would then be reviewed in accordance with the Act. If the Act is construed to apply to cases such as *Austin v. Bell*, in which this Court has conducted an evidentiary hearing and has completed review of thirty distinct claims for habeas

relief, then the very judicial system that had almost completed an arduous review of the petitioner's claims would be forced to start over from the beginning and reanalyze each of the petitioner's claims under the revised Act. Such a reading of the Act would conflict with the very goal of judicial economy that the Act seeks to promote.

For these reasons, the Court concludes that the Act does not apply to the current action. The Court reads the language of Section 107(c), pertaining to the statute's effective date,[2] to define "pending" cases as those in which no federal district court has commenced habeas review as of the enactment of the Act.

The Court now considers the merits of each of Petitioner's claims.

1. Heinous, Atrocious, or Cruel Aggravating Circumstance Instruction

The Court rejects Petitioner's claim that his sentence is unconstitutional based on the jury instruction regarding heinous, atrocious, or cruel aggravating circumstances. Although the jury was informed that if it found that the murder was especially heinous, atrocious, or cruel, such an aggravating circumstance could warrant imposition of the death penalty, the jury did not cite this aggravating circumstance as justification for its verdict. The only aggravating circumstance that the jury used to support its verdict was Tenn. Code Ann. § 39-2404(i)(4),

---

[2] Section 107(c) states that, "Chapter 154 of title 28 United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act."

the aggravating circumstance that the defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration. As a result, Petitioner's claim is moot. The Court denies habeas relief on the basis of this argument.

2. Allegedly Misleading Premeditation Instruction

The Court also denies Petitioner habeas relief with respect to this claim. The Court finds that Petitioner has inadequately plead [sic] this claim. Petitioner's claim is vague, conclusory, fails to set forth in facts supporting the claim, and should be dismissed. Rule 2(c) of the Rules Governing § 2254 Cases in the United States District Courts. *Spillers v. Lockhart*, 802 F.2d 1007, 1010 (8th Cir. 1986); cf. *Young v. Herring*, 938 F.2d 543 (5th Cir. 1991); *Koch v. Puckett*, 907 F.2d 524 (5th Cir. 1990); *McCoy v. Newsome*, 953 F.2d 1252 (11th Cir. 1992).

3. Instructions Regarding How to Weigh Aggravating and Mitigating Circumstances

Petitioner complains that the jury instructions at his sentencing, which were based on Tenn. Code Ann. § 39-2404, were unconstitutionally vague and overbroad because they failed to inform jurors how to weigh aggravating and mitigating circumstances. The Court rejects Petitioner's argunent. The Eighth Amendment requires that once the class of homicides is genuinely narrowed, the sentencer be allowed discretion to impose a lesser

punishment and be allowed to consider any relevant mitigating evidence. *See Lowenfield v. Phelps*, 484 U.S. 231, 244-46, 108 S.Ct. 546, 554-55 (1988). The jury instructions at Petitioner's sentencing did not, based on their failure to inform jurors exactly how to weigh aggravating and mitigating circumstances, prevent jurors from considering mitigating circumstances.[3]

The Court also rejects Petitioner's allegation of an Eighth Amendment violation based on the failure of the jury instructions to sufficiently limit jurors' discretion. Petitioner argues that such a violation exists "because, once the jury finds aggravation, it can impose the sentence of death no matter what mitigation is shown." This claim conflicts with the language of the Tennessee Death Penalty Act. The Act clearly mandates that a jury shall impose life imprisonment instead of the death penalty where the aggravating circumstances are outweighed by the mitigating circumstances. Tenn. Code Ann. § 39-2404(f).

4. The Absence of Written Findings Regarding Mitigating Circumstances

Petitioner complains that his confinement violates the Constitution based on the jury's failure to make written findings of fact regarding the presence or absence of

---

[3] This conclusion does not change the Court's earlier determination that the jury instructions were flawed for failing to inform jurors that juror unanimity regarding the presence of mitigating circumstances was not necessary in order for individual jurors to consider mitigating circumstances.

mitigating circumstances. Petitioner argues that this creates a problem for appellant review. The Court rejects this argument as a basis for habeas corpus relief. The Constitution does not require a jury that imposes a death sentence to make specific written findings of mitigating circumstances. *Martin v. Maggio*, 711 F.2d 1273, 1286-87 (5th Cir. 1983), *cert. denied*, 469 U.S. 1028 (1984); *Kordenbrock v. Scroggy*, 680 F.Supp. 867, 893 (E.D. Ky. 1988).

5. Requirement that the Sentence "Shall be Death"

Petitioner alleges that Tenn. Code Ann. § 39-2404(g) violates the Eighth Amendment because it limits the jury's discretion through the use of mandatory language. The statute provides that if the jury unanimously finds aggravating circumstances and finds that such circumstances are not outweighed by any mitigating circumstances, "the sentence shall be death." Petitioner's argument lacks merit because in Tennessee the death penalty may only be imposed after the jury unanimously concludes that aggravating circumstances outweigh mitigating circumstances. *See* Tenn. Code Ann. § 39-2404(f). Moreover, the language of Tenn. Code Ann. § 39-2404(g) does not prevent the jury from considering all relevant mitigating evidence in accordance with constitutional requirements. *See Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078 (1990); *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989) and *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978).

6. Alleged Shift of the Burden of Proving Mitigating Circumstances

Petitioner argues that the jury instructions, which were given in accordance with the provisions of Tenn. Code Ann. § 39-2404, impermissibly shifted the burden of proving the existence of mitigating circumstances to Petitioner, and that this violated the Eighth and Fourteenth Amendments. The Court rejects this argument. The language of Tenn. Code Ann. § 39-2404(g) places the burden of proving aggravating circumstances on the State. There is no statutory language that places the burden of proving mitigating circumstances on the defendant. Moreover, to the extent that the statute may implicitly place that burden on the defendant, that is not unconstitutional. *Walton v. Arizona*, 497 U.S. 639, 649-50, 110 S.Ct. 3047, 3055 (1990). The Supreme Court noted in *Walton* that, "So long as a State's method of allocating the burden of proof does not lessen the State's burden to prove . . . the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficient to call for leniency." *Id.*

7. The Prosecution's Allegedly Improper Final Argument at Sentencing Phase

The Court rejects Petitioner's argument that he is entitled to a writ of habeas corpus because the State made the final argument at the sentencing phase of his capital trial. Section 39-2404(d) of the Tennessee Death Penalty Act provides that, "In the sentencing proceeding, the state shall be allowed to make a closing argument to the

jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing." The fact that the state made the final argument at Petitioner's sentencing did not violate the Fifth Amendment due process requirement because that requirement applies to the federal government. The order of argument did not violate the Fourteenth Amendment because the proceedings still offered sufficient opportunity for the defendant to present his argument. *Herring v. New York*, 422 U.S. 853, 863, 95 S.Ct. 2550, 2555-56 (1975). The order of argument did not implicate the Fourteenth Amendment through the Eighth Amendment because it did not cause the death penalty to be imposed in a random manner. *See Romano v. Oklahoma*, 512 U.S. ___, ___, 114 S.Ct. 2004, 2009 (1994).

8. Whether Tenn. Code Ann. § 39-2404 Allows the Jury to Accord too Little Weight to Non-Statutory Mitigating Factors

The Court rejects the argument that Petitioner's confinement is unconstitutional based on the Tennessee Death Penalty Act's alleged failure to require jurors to accord sufficient weight to non-statutory mitigating factors. The statute does not direct the jury to treat statutory and non-statutory mitigating circumstances differently. Section 39-2404(j) of the statute provides that, "In arriving at the punishment the jury shall consider as heretofore indicated, any mitigating circumstances which shall include, *but not be limited to* the following . . . " (emphasis added). This provision comports with the

Eighth Amendment to the extent that it permits sentencers to consider relevant non-statutory mitigating factors. *See Blystone v. Pennsylvania*, 494 U.S. 299, 307, 110 S.Ct. 1078 (1990).

9. Tenn. Code Ann. § 39-2404, and the Act's Alleged Failure to Require that the Jury be Told that It May Impose a Life Sentence out of Mercy

Based on the Supreme Court's decision in *California v. Brown*, 479 U.S. 538, 539-43, 107 S.Ct. 837, 838-40 (1987), in which the Court upheld a jury instruction that directed jurors not to be swayed by sentiment, sympathy, passion or prejudice, the Court finds that the Tennessee Death Penalty Act does not violate the Eighth Amendment by virtue of its failure to require that jurors be informed that they may impose a life sentence out of mercy. However the Court affirms its earlier conclusion that the unanimity instruction at Petitioner's trial justifies the granting of a writ of habeas corpus.

10. Allegedly Insufficient Narrowing of the Death Eligible Population

The Court rejects the argument that the Tennessee Death Penalty Act is unconstitutional for failing to sufficiently narrow the death eligible population. The bifurcated proceeding provided for under the statute sufficiently narrows the population of death eligible defendants in accordance with the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. 153, 168-87, 96 S.Ct 2909, 2922-32 (1976). In Tennessee, if the defendant is found

guilty of first degree murder, a second proceeding is held before the same jury to determine the sentence. The jury may only impose the death penalty upon finding that one or more statutory aggravating circumstances are present, and further, that such circumstances are not outweighed by any mitigating circumstances. Tenn. Code Ann. § 39-2404(g). The burden of proof at the sentencing phase rests on the State.

11. Allegedly Unconstitutional Inconsistency with which the Death Penalty is Imposed in Tennessee

As the Court noted in the memorandum accompanying its prior Order (Doc. No. 205 at 29), the inconsistency with which the Tennessee Death Penalty is imposed does not justify granting Petitioner a writ of habeas corpus.

12. The State Post-Conviction Statute of Limitations and Alleged Violations of Constitutional Requirements Regarding *Ex Post Facto* Law and Due Process

Petitioner complains that the three-year statute of limitations which became effective on July 1, 1986, violated his fourteenth Amendment due process right and constituted an *ex post facto* law violating Article I, Section 10, Clause 1 of the Constitution. The Court rejects this claim. The three-year statute of limitations, contained within Tenn. Code Ann. § 40-30-102, required a prisoner to petition for post-conviction relief within three years of the date of the final action in the prisoner's case or to forgo the right to petition. The statute allowed petitioners

seeking to bring any post-conviction petitions that would have been barred on July 1, 1986, three additional years from that date in which to file their petitions. *See State v. Masucci*, 754 S.W.2d 90, 91 (Tenn. Crim. App. 1988).

The constitutional prohibition against *ex post facto* laws prohibits any statute which (1) punishes as a crime any act previously committed which was innocent when done; (2) makes more burdensome the punishment for a crime after its commission; or (3) deprives one charged with a crime of any defense available at the time the act was committed. *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S.Ct. 2715, 2719 (1990). Based on the above description of the impact of Tenn. Code Ann. § 40-30-102 and the standard set forth in *Youngblood*, the Court concludes that it was not an *ex post facto* law and did not violate due process requirements.

13. Alleged Prosecutorial Vindictiveness

The Court rejects the argument that the prosecution was vindictive when it sought the maximum sentence for the crime of first degree murder after Petitioner rejected the State's guilty plea offer. *See United States v. Goodwin*, 457 U.S. 368, 380-83, 102 S.Ct. 2485, 2492-94 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 363-65, 98 S.Ct. 663 (1978). The sentence that the state sought against Petitioner was within the authorized range for the crime with which Petitioner was charged.

14. Prosecution's Alleged Failure to Provide Notice of Aggravating Circumstances

Petitioner argues that the Tennessee Death Penalty Act violates the Sixth Amendment because it fails to require that the defendant receive notice of the prosecution's intended proof of aggravating circumstances. The Court rejects this claim. The Tennessee statue itself defines the aggravating circumstances upon which the jury may rely to justify imposing the death penalty. Tenn. Code Ann. § 39-2404(i). This statutory notice satisfies constitutional requirements. *See Andrews v. Shulsen*, 600 F.Supp. 408, 422 (D. Utah 1984), *aff'd*, 802 F.2d 1256, 1263 n.4 (10th Cir. 1986), *cert. denied*, 485 U.S. 919, 108 S.Ct. 1091 (1988).

15. Allegations that the Tennessee Death Penalty Act Improperly Allows Introduction of Evidence that is Otherwise Inadmissible to be Considered at Sentencing

The Court finds that this aspect of the Tennessee Death Penalty Act, Tenn. Code Ann. § 39-2404(c), does not deprive Petitioner of due process. There is no requirement that the rules of Evidence apply at a capital sentencing hearing. *Johnson v. Wainwright*, 778 F.2d 623, 632 (11th Cir. 1985), *reh'g denied*, 807 F.2d 999 (11th Cir. 1986), *cert. denied*, 484 U.S. 872, 18 S.Ct 201 (1987). Moreover, it is constitutionally permissible for the jury to consider the defendant's criminal record at sentencing. *Barclay v. Florida*, 436 U.S. 939, 951 n. 8, 103 S.Ct. 3418, 3425 n.8. To the extent that Petitioner argues that his prior convictions should not have been introduced because the convictions

were unconstitutionally obtained, *see* Amended Habeas Petition at ¶ 42, the Court notes that the jury did not list those convictions as aggravating factors justifying imposition of the death penalty. *See* Tenn. Code Ann. § 39-2404(i)(2). Thus, the doctrine of harmless error set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993), applies.

16. Alleged Violations of Double Jeopardy Protections

Petitioner argues that his confinement is unconstitutional because Tennessee's bifurcated approach to death penalty proceedings violates constitutional protections against double jeopardy. The Court rejects this argument. The Supreme Court has approved of bifurcated procedures such as Tennessee's *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). While the double jeopardy provision of the Fifth Amendment protects against a second prosecution for the same offense after conviction, the sentencing phase of a capital trial in Tennessee is concerned only with punishment and does not constitute a second trial for the same offense or create a separate and additional offense. *State v. Austin*, 618 S.W.2d 738, 742 (Tenn. 1981). Accordingly, the Court denies habeas relief on the basis of this claim.

17. Alleged *Sandstrom v. Montana* and *Francis v. Franklin* Violations

Petitioner alleges that the jury instructions at the guilt phase "were inadequate and improper as to the

mandatory presumptions as to an element of the crime in question." Amended Habeas Petition at ¶ 59. Petitioner fails to cite to specific deficiencies in support of this claim and merely cites to *Frances v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965 (1985) and *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450 (1979). The Court finds that these allegations are conclusory and insufficiently plead [sic]. The Court summarily dismisses these allegations. *Spillers v. Lockhart*, 802 F.2d 1007, 1010 (1986).

18. Allegations that the Death Penalty, as Administered in Tennessee, is Cruel and Unusual Punishment

The Court rejects Petitioner's argument that he is entitled to a writ of habeas corpus based on the allegedly unconstitutional conditions on Tennessee's death row. The Court finds that Petitioner must bring this claim regarding the conditions of his confinement under 42 U.S.C. § 1983. *Preiser v. Rodriguez*, 411 U.S. 475, 498-99, 93 S.Ct. 1827, 1841 (1973); *Maddux v. Rose*, 483 F.Supp. 661, 672 (E.D. Tenn. 1980), *affirmed*, 627 F.2d 1091 (6th Cir. 1980); *United States ex rel Broadnax v. DeRobertis*, 565 F.Supp. 327, 338 (N.D. Ill. 1983).

The Court also rejects Petitioner's claim that he was deprived of a meaningful opportunity to contact his attorneys while in prison. Petitioner himself admits that he has had the opportunity to meet and consult with his attorneys. Deposition of Petitioner at 17-20.

19. Allegedly Improper Use of Petitioner's Prior Convictions

Petitioner alleges that his prior robbery and larceny convictions were improperly used as aggravating factors at sentencing. Amended Habeas Petition at ¶ 42. As discussed above, the jury did not list as an aggravating circumstance the fact that the defendant had been previously convicted of one or more felonies involving violence or threat of violence to the person. *See* Tenn. Code Ann. § 39-2404(i)(2). Therefore, even if such an error occurred, it was harmless beyond a reasonable doubt under the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993).

20. Whether Prosecution Improperly Sought to Diminish Jury's Responsibility for Imposing Sentence Through Improper Argument

Petitioner alleges in paragraph 43 of his amended Habeas Petition that the prosecutor, through his closing argument at the penalty phase of the trial, sought to diminish the jury's responsibility for imposing the death penalty in violation of the Eighth and Fourteenth Amendments to the Constitution. The Court finds that this allegation is conclusory and insufficiently plead and should be summarily dismissed. *Spillers v. Lockhart*, 802 F.2d at 1010.

21. Allegations that Prosecution Improperly Argued "Victim Impact Evidence"

Petitioner alleges that the prosecution improperly argued victim impact evidence at both the guilt and sentencing phases of Petitioner's trial in violation of the Eighth and Fourteenth Amendments. The Court rejects this argument. The argument that was presented at Petitioner's trial regarding the impact of Petitioner's crime was not unconstitutional under the Eighth or Fourteenth Amendment. *See Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597 (1991).

22. Allegedly Improper "Death Qualification" of the Jury

Petitioner raises several claims regarding the "death qualification" of his jury. Petitioner argues that the exclusion of jurors due to their opposition to the death penalty was improper because such opposition would not have prevented or substantially impeded them from performing their duty as jurors, because juror exclusion created a jury biased in favor of the prosecution, because juror exclusion predisposed the jury to convict and sentence Petitioner to death, and because such exclusion was accomplished through the use of an improper religious and political test for jury service.

The Court rejects these arguments because they are conclusory and insufficiently plead. *Spillers v. Lockhart*, 802 F.2d at 1010. In addition, the Court notes that a prospective juror may be excluded for cause because of his or her views on capital punishment if those views

would prevent or substantially impair the juror from performing that juror's duty in accordance with the juror's instructions and oath. *Lockhart v. McCree*, 476 U.S. 163, 106 S.Ct. 1758 (1986); *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844 (1985). Such exclusion would not constitute exclusion improperly based on a religious or political test. Moreover, the trial judge's findings that the prospective jurors are excludable are factual findings entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *Wainwright v. Witt*, *Wainwright v. Witt*, 469 U.S. at 429.

II. Conclusion

Upon review of Petitioner's remaining claims for habeas corpus relief, the Court finds that these claims lack merit. Accordingly, the Court DENIES Petitioner habeas corpus relief on the basis of these claims.

An Order consistent with the foregoing reasoning will be entered contemporaneously with this Memorandum.

Entered this the 8th day of May, 1996.

/s/ John T. Nixon
JOHN T. NIXON,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RICHARD H. AUSTIN	]	
v.	]	No. 3:86-0293
	]	
RICKY BELL, Warden	]	

ORDER

Pending before the Court in the above-styled case are those of Petitioner's arguments for habeas corpus relief not contained within Petitioner's Motion for Summary Judgment (Doc. No. 146).

In accordance with the reasoning set forth in the contemporaneously entered Memorandum, the Court hereby DENIES Petitioner relief on all of these claims.

Entered this the 8th day of May, 1996.

/s/ John T. Nixon
JOHN T. NIXON,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

APPENDIX D

RICHARD HALE AUSTIN, Appellant
vs.
STATE OF TENNESSEE, Appellee

No. 33
COURT OF CRIMINAL APPEALS
OF TENNESSEE, AT JACKSON
Slip Opinion
April 17, 1985

Shelby County, Hon. Dick Jerman, Jr.,
Judge by Designation (Post-Conviction and Coram Nobis)

COUNSEL

FOR THE APPELLANT: FRANK J. GLANKLER, JR., J. N. RAINES, C. BARRY WARD, RANDALL B. WOMACK, Memphis, Tennessee

FOR THE APPELLEE: HUGH W. STANTON, JR., Dist. Atty. Gen., VERONICA COLEMAN, Ass't. Dist. Atty. Gen., W. J. MICHAEL CODY, Attorney General, GORDON W. SMITH, Ass't. Atty. Gen.

JUDGES

Russell, Special Judge wrote the opinion. Concur: Robert K. Dwyer, P.P.J., Joe D. Duncan, J.

AUTHOR: RUSSELL

OPINION

WILLIAM S. RUSSELL, SPECIAL JUDGE

Richard Hale Austin, heretofore convicted of first degree murder and of being an accessory before the fact to murder in the first degree and sentenced to die in the electric chair, filed a petition for post-conviction relief

and also a petition for a writ of error coram nobis. Austin appealed his conviction and sentence to the Tennessee Supreme Court. That court affirmed the judgment of the trial court. **State v. Austin,** 618 S.W.2d 738 (Tenn. 1981). The United States Supreme Court denied a petition seeking a certiorari review by that court. 102 S. Ct. 980 (1981).

The petition for post-conviction relief was bottomed upon the thesis that Austin was unconstitutionally denied the effective assistance of counsel for his defense. The petition for the writ of error coram nobis had as its grounds an alleged post-trial statement to a penitentiary inmate, Haywood, by a state's witness, Casteel, saying that Casteel's trial testimony inculpating Austin was untrue; and a statement by Blankenship, the admitted triggerman in the subject murder, saying that Austin had not in fact hired him to do the killing (as the jury had found that Austin had done).

The trial court summarily dismissed the petition for the writ of error coram nobis, but permitted the factual issues set out therein to be fully developed upon the patiently held evidentiary hearing conducted to address the factual issues presented by the petition for post-conviction relief.

The trial judge held that Austin was not unconstitutionally deprived of the effective assistance of counsel. That ruling has been appealed to this Court; where Austin's appellate counsel have presented the issues raised with skill, dedication and a high level of professionalism. This Court has carefully reviewed the case in all of its aspects, being well aware that the appellant has been sentenced to death and that such a sentence carries no

room for harmful error in the conviction process. We find that the trial judge correctly ruled, and we affirm the judgment dismissing both petitions.

Austin contends that his trial counsel, Robert I. Livingston, failed to measure up to the standard of counsel competency required by **Baxter v. Rose**, 523 S.W.2d 930 (Tenn. 1975), wherein our Supreme Court announced that henceforth the standard is simply whether the advice given, or the services rendered by the attorney, are within the range of competency demanded of attorneys in criminal cases. The Tennessee Supreme Court therein cited **Beasley v. United States**, 491 F2d 687 (6th Cir. 1974) with approval. That case holds that a criminal defense attorney must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously and unaffected by conflicting considerations protect his client's interests. Also cited with approval in **Baxter v. Rose, supra**, is **United States v. DeCoster**, 487 F.2d 1197 (D.C. Cir. 1973), which requires **inter alia**, that counsel be guided by the American Bar Association Standards for the Defense Function.

In reviewing this record, and measuring Attorney Livingston's performance against the established standard for a constitutional representation, we have given particular attention to (1) his tactical decision to not call the triggerman, Blankenship, when he, Livingston, had in his possession at trial a signed statement of Blankenship exculpating Austin; and (2) his failure to introduce any proof whatsoever upon the sentencing hearing, whereupon the jury was called upon to choose between life imprisonment and death by electrocution for his client.

Without going into an exhaustive review of the case, it suffices for us to say that one Watkins, who was an undercover police officer scheduled to be a prosecution witness against Austin in a pending prosecution for illegal gambling, was shot to death in a contract killing by an escaped convict named Blankenship. One Casteel, an employee of Austin, testified to his own participation in the criminal undertaking, and testified that he was present at the crime scene and that he witnessed the hiring of Blankenship by Austin to commit the cold-blooded assassination of Watkins. About three months prior to the commencement of Austin's trial, Blankenship struck a plea bargain and received a life sentence for Watkins' murder. This occurred on July 7, 1977. A week later Attorney Livingston obtained Blankenship's written statement, in which Blankenship denied that Austin had hired him to do the killing.

Attorney Livingston chose not to call Blankenship as a defense witness. This is strongly relied upon by Austin, through present counsel, as being an omission constituting unconstitutional incompetency. Expert testimony by two experienced criminal case defense attorneys was introduces to support this position.

Attorney Livingston, in explanation of his action, testified that he had no confidence in Blankenship's credibility and made a deliberate decision not to call him. At that time Blankenship was a penitentiary inmate, who had already negotiated a plea bargain. He was an admitted cold-blooded killer. The defendant, Austin, testified in his own behalf, and, of course, denied hiring Blankenship. The State had called Casteel, who had testified to the contrary. The State did not call Blankenship.

It is not difficult to support the tactical decision of Attorney Livingston. First, the rational thrust of his defense was to disassociate his client from Blankenship, who admittedly had committed this reprehensible crime. The act of calling Blankenship as his witness, even if all went well with the testimony, would arguably identify Blankenship with Austin in the eyes of the jury.

Even more persuasive is the logically presumed uncertainty of what such a man might testify to, and the certainty of the defendant's doom if Blankenship were to testify favorably for the State. Here was Blankenship, a veteran felon, incarcerated under the control and discipline of the State, who had made a deal with the State in order to avoid the death penalty himself. Not all veteran criminal defense attorneys would feel sufficiently secure in calling such a witness, to think it to be the indicated thing to do, even when armed with his prior written statement. What stood to be lost by such a tactic was everything. Had Mr. Livingston called Blankenship, and had he changed his story and testified that Austin had hired him, Mr. Livingston's judgment in putting him on the stand would certainly have been questioned.

The controlling point is that this was a tactical decision that had to be faced and made during the course of the trial. It cannot be said as a matter of law that the decision made and the course followed constituted ineffective assistance of counsel.

Next, we focus upon the admitted failure of Mr. Livingston to introduce any proof upon the sentencing phase of the trial. Our then new statute, T.C.A. § 39-2-203, contained this language:

(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. * * *

* * *

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or the advanced age of the defendant at the time of the crime; and

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

Nothing has come to our attention, in reviewing the trial transcript and the transcript of the evidence introduced upon the hearing upon the post-conviction petition, that suggests a mitigating circumstance that should have been presented to the jury upon the sentencing hearing. Present counsel do not suggest specific evidence that should have been presented. They do mention that Austin's sister, Midge Evans, tried to get Mr. Livingston to call her as a witness during the sentencing phase and he declined; but they do not suggest what she might have testified to. It is also argued that a minister and a neighbor would have testified, we assume to Austin's good character. Given the facts of this case, the failure to call character witnesses for Austin would not have changed anything.

Complaint is made that Mr. Livingston failed to make an adequate factual investigation of the case, and failed

to interview potential witnesses. The trial judge found to the contrary, and the evidence does not preponderate against this finding. Nor is there any showing of prejudice resulting from this alleged deficient performance.

It is also argued in Austin's behalf that there was a failure to cross-examine or to adequately cross-examine the State's witnesses. In our view the record does not support this Complaint. Cross-examination may or may not be the mark of competent advocacy. It is a two-edged sword the overuse of which may be a poor trial tactic. Certainly, absent the demonstration of a specific prejudice from its non-use or under-use, and we have no showing of such prejudice here, cross-examination falls into the category of trial strategy. See **Hellard v. State**, 629 S.W.2d 4 (Tenn. 1982). The trial judge found no merit to this complaint, and we agree.

We find no prejudicial error from trial counsel's failure to object to evidence upon the trial. Likewise, we hold that Attorney Livingston's submission of his motion for a new trial without having first read the transcript of the trial (in which he participated) did not amount to incompetent practice. Present counsel have made no showing that trial counsel failed to raise any meritorious issue in the motion for a new trial.

There was a degree of non-cooperation between trial counsel and appellate counsel during the period of the transfer of defense responsibility. Despite his assurances to present counsel that he would not do so, Mr. Livingston submitted his motion for a hew [sic] trial without giving present counsel an opportunity to submit amendments, including the affidavit of Blankenship saying that

Austin was not involved in the murder. However, as we view it this affidavit was not newly discovered evidence. Such a statement, as we have already discussed, was in defense counsel's hands for three months prior to the trial, so would not have qualified as newly discovered evidence for the purpose of obtaining a new trial. **Sherrod v. State,** 567 S.W.2d 482 (Tenn. Crim. App. 1978). No prejudice from counsel non-cooperation has been shown. This reasoning also applies to the assertion that Mr. Livingston promised to obtain a continuance for the hearing upon the motion for a new trial and did not attempt to do so. Present counsel were able to present all appealable issues to the appellate courts. We find nothing in this record to demonstrate that Attorney Livingston failed to preserve any meritorious issue for appeal.

Attorney Livingston, after the trial was over, wrote to Austin, with a copy to the trial judge, indicating a dislike for and [sic] distruct [sic] of Austin. Subsequently, in open court, he referred to Austin as a crook. We find that Attorney Livingston's conduct was unprofessional; but we find no evidence of this negative relationship during the trial itself and no prejudice to Austin's right to a fari [sic] trial.

Finally, we address the issue of the summary dismissal of the petition under T.C.A. § 40-26-105 for the writ of error coram nobis. We have held in **Cole v. State,** 589 S.W.2d 941 (Tenn. Crim. App. 1979) that in ruling upon such a petition, the trial court must find:

(1) whether or not there now exists subsequently or newly discovered evidence (even though related to matters previously litigated),

(2) which might have resulted in a different judgment had it been presented at trial,

(3) but which was not presented at that time through no fault of the defendant.

Obviously, tested in this light, the basis for this petition (i.e. the statements of Haywood and Blankenship) do not qualify for coram nobis relief. Haywood's statement is classic impeachment-only evidence, and as such does not constitute newly discovered evidence warranting a new trial. **Harper v. State,** 206 Tenn. 509, 334 S.W.2d 933 (1960); **Hicks v. State,** 571 S.W.2d 849 (Tenn. Crim. App. 1978).

Blankenship's statement does not constitute newly discovered evidence, as previously discussed, because it wasn't newly discovered but was already known upon the trial, so it does not qualify Austin for coram nobis relief.

The learned trial judge who heard this case by designation of the Tennessee Supreme Court held a careful, courteous and full evidentiary hearing upon the issues. He then drafted and filed a comprehensive findings of fact and conclusions of law. We affirm his judgment, including his commendation of present counsel on both sides.

CONCUR: Robert K. Dwyer, P.P.J., Joe D. Duncan, J.

Supreme Court, U.S.
FILED
FEB 2 1998
CLERK

(2)

No. 97-1112

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

RICKY BELL, Warden,

Petitioner,

v.

RICHARD H. AUSTIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Larry D. Woods
WOODS & WOODS
P.O. Box 24727
Nashville, TN 37202-4727
(615) 259-4366

Counsel for Respondent Richard H. Austin

RECEIVED
FEB 4 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

35 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI: ARGUMENT 5

I. THE MERITS OF PETITIONER'S SECOND REASON FOR GRANTING THE WRIT DO NOT JUSTIFY GRANTING THE WRIT SINCE THE COURTS BELOW CORRECTLY APPLIED STRICKLAND v. WASHINGTON CONCERNING THE TRIAL ATTORNEY'S FAILURE TO PRESENT ANY EVIDENCE WHATSOEVER AT SENTENCING AND HIS FAILURE TO CALL CRITICALLY IMPORTANT WITNESSES 5

II. AT THE TIME OF DEFENDANT AUSTIN'S DIRECT APPEAL TENNESSEE HAD NO INDEPENDENT AND ADEQUATE PROCEDURAL DEFAULT RULE IN EXISTENCE AND THE TENNESSEE COURT DID NOT CLEARLY AND EXPRESSLY RELY UPON A PROCEDURAL DEFAULT RULE. ALTERNATIVELY, CAUSE AND PREJUDICE EXISTED SO AS TO EXCUSE ANY PROCEDURAL DEFAULT, ESPECIALLY WHERE, AS HERE, CLAIMS OF ACTUAL INNOCENCE AND INEFFECTIVENESS OF COUNSEL ARE AT ISSUE 23

CONCLUSION 31

PROOF OF SERVICE 32

TABLE OF AUTHORITIES

Page

Adams v. State, 547 S.W.2d 553 (Tenn. 1977) 24, 28
Caldwell v. Mississippi, 472 U.S. 320, 327-28 (1985) 25
Coleman v. Thompson, 50 U.S. 722, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991) . 24, 25, 26
Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1977) 21
Deutscher v. Whitley, 884 F.2d 1152, 1160-61 (9th Cir. 1989) 21
Glenn v. Tate, 1995 FED App. 0373P, No. 93-3568 (6th Cir. 12/21/95) 18, 19
Gregg v. Georgia, 428 U.S. 353, 189 n.38 (1976) 21
Harris v. Dugger, 874 F.2d 756, 763 (11th Cir.) cert. denied 110 S.Ct. 573 (1989) 21
Harris v. Reed, 489 U.S. 225, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989) 24, 25
Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991) cert. denied,
503 U.S. 592 (1992) 19
Keeney v. Tamayo-Reyes, 504 U.S. 1, 12 (1992) 23, 31
Kubat v. Thieret, 867 F.2d 351, 367 (7th Cir.) cert. denied 110 S.Ct. 206 (1989) 21
McCleskey v. Zant, 499 U.S., at 494 30
Mason v. Balcom, 531 F.2d 717 (5th Cir. 1976) 21
Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) 25
Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2646-2650,
91 L.Ed.2d 397 (1986) 27, 28, 30
Kenneth Wayne O'Guinn v. Michael Dutton, 1996 FED App. 0194P (6th Cir.)
No. 93-5578/5620 (U.S. Court of Appeals for the Sixth Circuit 7/3/96) 24, 26
O'Neal v. McAninch, 115 S.Ct. 992 (1995) 19
Powell v. Alabama, 287 U.S. 45, 56 (1932) 20
Reed v. Ross, 468 U.S. 1, 16, 104 S.Ct. 2901, 2910, 82 L.Ed.2d 1 (1984) 27
Ronald E. Rickman v. Michael Dutton, (No. 3:85-0256, U.S. District Court,
Middle District of Tennessee) 18
Smith v. Murray, 477 U.S. 527, 534, 106 S.Ct. 2661, 2666, 91 L.Ed.2d 434 (1986) 27
State v. Austin, 618 S.W.2d 738 (Tenn. 1981) 25
State v. Duncan, 698 S.W.2d 63 (Tenn. 1985),
cert. denied 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 348 (1986) 24
State v. Martin, 702 S.W.2d 560 (Tenn. 1985) 24
Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984) ... i, 5, 15, 18, 19, 20, 28
United States v. Cronic, 466 U.S. 648, 659 (1984) 20
United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596,
71 L.Ed.2d 816 (1982) 27
United States v. Goodwin, 531 F.2d 347 (6th Cir. 1976) 18
United States v. Pinkney, 551 F.2d 1241 (D.C. Cir. 1976) 21
United States v. Stewart (No. 73-2125, U.S. Court of Appeals for the
Sixth Circuit, Feb. 1, 1974) 18

Warner v. United States, 975 F.2d 1207, 1213-13 (6th Cir. 1992),
cert. denied, _____ U.S. _____, 113 S.Ct. 1314, 122 L.Ed.2d 702 (1993) 26
Ylst v. Nunnemaker, 501 U.S. 797 (1991) 26

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in this case is published at 126 F.3d 843. The opinions of the United States District Court in this case are published at 927 F.Supp. 1058 and 938 F.Supp. 1308.

JURISDICTION

The judgment of the United States Court of Appeals was entered October 2, 1997. No rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(l).

STATEMENT OF THE CASE

Defendant Richard Austin was convicted in October, 1977 under the second count of an indictment charging defendant in the first count with murder in the first degree and charging defendant in the second count with being an accessory before the fact to the offense of murder in the first degree. (State court trial transcript, Vol. IX, page 1016, hereinafter cited as "Tr. _____"). The prosecution's theory of the case at trial was that defendant Richard Austin, who owned a pool hall in Memphis, procured and paid to have Julian Watkins, an undercover special reserve agent, killed because Mr. Watkins led the undercover investigation that resulted in minor gambling charges having been brought against defendant Austin, his estranged wife, Joann Austin, and others. Defendant Austin was represented from arraignment through trial by Memphis attorney Robert Livingston.

No investigation of the case was conducted by attorney Livingston despite defendant Austin's consistent protestations of actual innocence except for a single interview of Jack Charles Blankenship, the hired killer who admitted that defendant Austin had nothing to do with the

crime. The case was tried before a jury and on October 22, 1977 the verdict of the jury was to find Mr. Austin "guilty of Accessory Before the Fact to Murder in the First Degree as charged in the second count." (Tr. 1048). The jury acquitted defendant Austin of the murder charge in count one of the indictment (Tr. 1048).

At the sentencing phase of this death penalty trial, defendant Austin's attorney presented no evidence whatsoever at the sentencing phase. The jury found that the punishment for defendant Austin should be death by finding only one of the four aggravating circumstances that the prosecution argued (Tr. 1139). The court imposed the sentence of death (Tr. 1140).

Defendant Austin's first post-conviction proceeding was heard in the Shelby County, Tennessee Criminal Court where two expert witnesses who were practicing attorneys in Shelby County testified in support of his post-conviction application on the issue of ineffective assistance of counsel. (Tr. 498-512).

Hearing was held in the United States District Court for the Middle District of Tennessee resulting in the grant of the writ of habeas corpus. References to the three volume transcript of the evidence in that proceeding will be cited as EH. Tr. _____.

The appeal to the United States Court of Appeals resulted in a judgment affirming the United States District Court on the finding of ineffective assistance of counsel at sentencing, but reversing the U.S. District Court on its finding of ineffective assistance of counsel at the guilt/innocence phase of the state court trial and reversing as to the "reasonable doubt" jury instruction.

There was no specific direct ruling by the United States Court of Appeals in this case as to

petitioner Bell's first alleged reason for granting the writ. No request for rehearing was made by petitioner Bell.

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI: ARGUMENT

I. THE MERITS OF PETITIONER'S SECOND REASON FOR GRANTING THE WRIT DO NOT JUSTIFY GRANTING THE WRIT SINCE THE COURTS BELOW CORRECTLY APPLIED STRICKLAND v. WASHINGTON CONCERNING THE TRIAL ATTORNEY'S FAILURE TO PRESENT ANY EVIDENCE WHATSOEVER AT SENTENCING AND HIS FAILURE TO CALL CRITICALLY IMPORTANT WITNESSES.

Defendant Richard Austin was represented at his state court death penalty trial by attorney Robert Livingston.[1] Attorney Livingston presented absolutely no evidence at the sentencing phase of this death penalty trial despite the availability of numerous members of Richard Austin's family, his doctor and medical records, a minister, expert witnesses and others. Attorney Livingston failed to investigate and declined to interview any witnesses in preparation for the guilt phase of the trial. As a result, the United States District Court and the United States Court of Appeals ruled that attorney Livingston rendered constitutionally ineffective assistance of counsel.

Attorney Livingston demonstrated very little interest in the actual representation of defendant Austin in this death penalty trial. Attorney Livingston repeatedly demonstrated his lack of commitment and interest in the case right up through the federal court habeas proceeding when attorney Livingston failed to appear in response to a proper subpoena. Previously attorney Livingston had arbitrarily refused to answer questions at his deposition and defendant was required to obtain a federal court order mandating attorney Livingston to appear and answer questions about his role as the attorney in defendant's state court death penalty trial.

Attorney Livingston admits that he did not investigate and did not interview any witnesses

---

[1] Defendant Richard Austin has previously filed a petition for a writ of certiorari (Richard H. Austin, Petitioner v. Ricky Bell, Warden, Respondent) in this case limited to issues concerning ineffective assistance of counsel at the guilt/innocence phase of his trial and limited to the jury instruction concerning "reasonable doubt."

in preparation for sentencing in this case except defendant Richard Austin himself. As to his interviews of defendant Austin, attorney Livingston admits that he made no memoranda or notes reflecting any client interviews prior to trial. (State Post-conviction Transcript, December, 1983, at 331; September, 1995 Livingston Deposition at 161-162).

Attorney Livingston presented no witnesses and no evidence at the sentencing phase of defendant Austin's death penalty trial. (September, 1995 Deposition of Livingston at 32) and he did no research as to what proof was admissible or available:

> Q. As Mr. Austin's attorney at the 1977 murder trial you did not call any witnesses during the mitigation or sentencing hearing; correct?
>
> A. Didn't have any to call, Mr. Woods.
>
> Q. Why not?
>
> A. There were none.
>
> Q. How about his doctor?
>
> A. His doctor?
>
> Q. Yes, sir.
>
> A. No, I didn't call his doctor...I don't know that that would have been a mitigating circumstance, that the man had a heart condition.
>
> Q. How about his family?...
>
> * * *
>
> A. ...I have found that family members are generally pretty much disregarded by a jury...
>
> * * *
>
> Q. So why did you not call any of the family members at the sentencing hearing? What was the downside to calling them?

A. I didn't see that they could contribute one iota to Richard Austin. Get up there and say that Richard Austin is a fine man when Richard Austin was not a fine man. Richard Austin was a savory (sic) character, of bad character, and I have never offered proof of good character for a defendant that I know was of bad character.

Q. So why did you have Mr. Austin testify then?

A. I expect Richard wanted to get up there and have his say....

* * *

Q. How about employees?

A. Employees? To testify as to Richard Austin's good character?

Q. ...how about employees testifying about how Mr. Austin treated them?

A. What would that have to do with a murder trial, how he treated them?

Q. Mr. Livingston, did you do any research before the Richard Austin murder case and sentencing hearing as to what's admissible at a mitigation hearing in a death penalty case?

A. Yes, sir, it was brand-new law.

Q. What did you conclude was admissible?

A. I concluded there were no mitigating circumstances.

* * *

Q. Did you read any of the reported case opinions in Federal Court on what's admissible at a mitigation hearing in a death penalty case?

A. I don't think at that time there were any reported cases pertaining to the 1977 death penalty law. There hadn't been time to write any.

Q. In other words, the U.S. Supreme Court cases on the Ohio or North Carolina or Georgia death penalty statute, you either didn't read them or you assumed they had no application.

A. No, I didn't read them. I didn't say they had no application; I say I didn't

read them.

Q. So the only research, legal research you did to prepare for the mitigation hearing was to look at the Tennessee Code Annotated.

MR. BAKER: Objection; leading.

THE WITNESS: That's exactly right.

(September, 1995 Livingston Deposition at 32 through 37). Attorney Livingston never had any intention of calling witnesses during the sentencing phase. (State Post-conviction Transcript, December, 1983, at 360 and 362). As to Richard Austin testifying, attorney Livingston simply recalls no conversations prior to trial with Mr. Austin about taking the witness stand and possibly talked to defendant Austin during a trial recess. (State Post-conviction Transcript, December, 1983, at 399).

Further, attorney Livingston states in his August 17, 1995 affidavit (part of Docket Entry 160) that he did not present any proof or witnesses at the mitigation hearing because it would have opened the door for rebuttal evidence. At his September, 1995 deposition attorney Livingston admits that the only possible negative character evidence in rebuttal would have been that Richard Austin was a pool shark (page 42), had two prior felony convictions (pages 42-43), and a previous gambling conviction where he paid a $29 fine (page 44), all of which had already been admitted into evidence previously by the prosecution. Thus, there could not have been any rebuttal on these issues.

Attorney Livingston also claims he failed to present mitigating evidence because it would have opened the door to rebuttal about "criminal associations" of Richard Austin and Livingston testified that the "criminal association" was Danny Owens who loaned Austin $1,000.

(September, 1995 Livingston Deposition at 46). Attorney Livingston then had to admit that all of this alleged rebuttal evidence (the felony convictions, pool shark, a gambler, a friend of Danny Owens, etc.) was "presented as proof at the 1977 murder trial by the prosecution, wasn't it?" The answer by Mr. Livingston was "it wasn't presented by me, though." The deposition continued. "Q. But it was presented by the prosecution?" "A. I think it was. I think it should have been. I think it was proper." (September, 1995 Livingston Deposition at 48). State court prosecutor McNeese confirmed this at the evidentiary hearing when he pointed out that the prosecution introduced evidence about Richard Austin's prior convictions during their case in chief at the sentencing phase of the bifurcated trial. (EH. Tr. 27).

The proof at the evidentiary hearing confirmed that attorney Livingston made no efforts to properly investigate and prepare. For example, Martha Purser, youngest sister of Richard Austin, testified at the evidentiary hearing that she was available in Memphis, Shelby County, Tennessee in October, 1977 when Richard Austin was tried for murder and was present at the trial every day. (EH. Tr. 42-43). Ms. Purser could have testified as to her life long knowledge of her brother at the mitigation/sentencing hearing. Instead, attorney Livingston never interviewed her (EH. Tr. 50); never asked what she knew about the murder of Julian Watkins (EH. Tr. 50); and attorney Livingston told her that "it wouldn't be good for a relative to testify" at the sentencing phase (EH. Tr. 50). A proper investigation and preparation would have demonstrated that Ms. Purser could have testified that Richard Austin was "well-mannered, generous;" that he was "good to people;" that he gave money and clothing to relatives and friends as well as to a neighbor lady and bought Christmas presents for children in the neighborhood who lacked money (EH. Tr. 50-51). Ms. Purser could also have testified as to Richard Austin's serious medical

problems including a heart attack and complications (EH. Tr. 51-52).

Even more important, Ms. Purser could have testified that Joann Austin, the defendant's estranged wife (who was also being represented by attorney Robert Livingston) and Terry Lee Casteel, the state's star witness had a romantic relationship behind defendant Austin's back. If interviewed and called to testify in 1977, she would have described the relationship between the state's star witness, Terry Lee Casteel, and defendant's wife, Joann Austin, as "spellbound" (EH. Tr. 53). She would have testified that when Terry Casteel's wife "kicked him out" that Joann Austin took Terry into her home, bought clothes for him, and Joann "was always talking about Terry...." (EH. Tr. 53-54). Ms. Purser would have testified in 1977 that Terry Casteel would have done anything for Joann Austin. (EH. Tr. 54).

Marsha Birdsong is defendant Richard Austin's stepdaughter. Her mother is Joann Austin, now known as Joann Skelton (EH. Tr. 65-66). Ms. Birdsong was residing in Memphis and was 18 years old at the time of trial. She was never interviewed by attorney Livingston. (EH. Tr. 65-66). If attorney Livingston had called her as a witness at sentencing, she could have testified "about the background and life history and lifestyle of Richard Austin" and would have testified that he was "...a good person...a good-hearted person...a caring person, a loving person...[who] would help anyone he could help" and that she had seen him do this "many times" (EH. Tr. 67). She also observed Richard Austin helping and attempting to help employees of the Golden Cue (EH. Tr. 68). She also could have testified that her mother, Joann Austin, had been hospitalized in 1977 (EH. Tr. 69) and knew that she had received psychiatric treatment in the 1970's (EH. Tr. 66). Ms. Birdsong attended the trial in October, 1977 (EH. Tr. 69). Attorney Livingston never introduced any of this evidence and never attempted to do so.

Another available but uncalled witness was Donald J. McClary who grew up with Richard Austin and knew him for 45 years (EH. Tr. 74-75). If Mr. McClary had been interviewed and if he had been asked to testify he would have made himself available and would have testified at the mitigation/sentencing hearing. Mr. McClary could have testified about how Richard Austin grew up, how he worked, and his helping other people such as Richard Austin giving Mr. McClary the money he needed to go to college. (EH. Tr. 76). Attorney Livingston never introduced any of this evidence and never attempted to do so.

Another available but uncalled witness was Midge Edwards who is the older sister of Richard Austin who grew up with him and has known him all his life (EH. Tr. 80-81). She was present at the Richard Austin trial in 1977 every day and talked to attorney Livingston several times before and during the trial. Each time attorney Livingston would say, "I don't have time for this" or "I don't need this" or "It is going to be year or two years before we need anything." (EH. Tr. 82). Ms. Edwards wanted to testify at the trial but did not because attorney Livingston said, "I'd let you sit in the courtroom; you can't testify...we don't need you anyway." (EH. Tr. 82-83). Ms. Edwards pointed out that most of Richard Austin's family was available and could have testified if interviewed and called. (EH. Tr. 84). Ms. Edwards made this known to attorney Livingston at the time of the trial. (EH. Tr. 84).

Ms. Edwards also could have testified about the relationship between Joann Austin and Terry Lee Casteel. She "saw them together. They were always talking real secret-like." (EH. Tr. 84). Midge Edwards also could have testified that when Joann Austin lived in her house in 1977, Ms. Edwards found in Joann's possession family photographs of Terry Casteel's children (EH. Tr. 100-101). Attorney Livingston never introduced any of this evidence and never attempted to do

so.

Sean Trimble testified that he is Richard Austin's son and would have been ten years old at the time of the October, 1977 trial. He was available to testify at the state court trial and would have testified about his great love for his father, but attorney Livingston never talked to him. (EH. Tr. 93-94).

Tammy Croft is Richard Austin's niece and would have been 13 at the time of the state court trial. She was never interviewed by attorney Livingston but was available to testify that Richard Austin was "a wonderful uncle, that he has always been there for me. All dance recitals, piano recitals, there to be the best uncle there is." (Eh. Tr. 95-96). Attorney Livingston never introduced any of this evidence and never attempted to do so. Ms. Croft was also one of the persons also who researched the Glankler law firm records in an unsuccessful attempt to find the tape recordings of Joann Austin that attorney Livingston failed to investigate or use. (EH. Tr. 97).

Billie Sue Edwards is Richard Austin's sister and was available to testify in Memphis in October, 1977. She was never interviewed by attorney Livingston and never talked to him. (EH. Tr. 106). She could have testified about Richard Austin's family life and his relationship to his parents as well as his having been hospitalized 21 days in intensive care. (EH. Tr. 107-108). Jimmy Edwards, Richard Austin's nephew, could have testified to similar issues (EH. Tr. 110) as could Jenny McDaniel (EH. Tr. 112-113). Attorney Livingston never introduced any of this evidence and never attempted to do so.

The Reverend Joseph B. Ingle also was available to testify in October, 1977 at the mitigation/sentencing hearing. Reverend Ingle holds a Master of Divinity degree from Union

Theological Seminary, was the recipient of a Merrill Fellowship to Harvard University, and has twice been nominated for the Nobel Peace Prize (EH. Tr. 119-120). Reverend Ingle was a co-founder of the Southern Coalition of Jails and Prisons in Tennessee which sponsored legal seminars for lawyers in connection with death penalty cases (EH. Tr. 120-212). Such a seminar was held in Tennessee in September, 1977 where attorneys from the Southern Poverty Law Center lectured about trial and appellate experience in death penalty cases. The seminar was presented for "lawyers in Tennessee" so they could learn expertise and knowledge "about how to interpret the new laws" on the death penalty (EH. Tr. 121). For this seminar lawyers were invited statewide using the Tennessee Association of Criminal Defense Lawyers mailing list (of which attorney Livingston was a member) (EH. Tr. 121-122).

Reverend Ingle has counseled numerous inmates on every death row in the south (except Arkansas) and has published numerous newspaper, magazine and book articles about the death penalty (EH. Tr. 122-123). He has testified in several death penalty cases about the Christian perspective concerning the death penalty which is "that we should be about forgiveness and redemption and reconciliation." (EH. Tr. 122-123).

Although Reverend Ingle had a very "high-profile involvement all across the state" in 1977 concerning the death penalty, neither he nor his organization was ever contacted by attorney Robert Livingston (EH. Tr. 124). His organization paid a great deal of attention to the Richard Austin case because it was the first case tried under the new Tennessee death penalty law (EH. Tr. 125) and it was his usual and customary practice to "routinely send a letter to the defense lawyer" in every Tennessee death penalty case to advise the defense lawyer that his organization had a brief bank, pleadings, research and other resources available to help the lawyer including the

names of local ministers in the county where the case was to be tried who were willing to testify. (EH. Tr. 125-127). In fact, attorneys Ed Lenow and Charles Wright who represented co-defendant Terry Castee! testified that their 1977 files contained a newsletter from Southern Prison Ministry about the Tennessee death penalty. (EH. Tr. 305, 343). Attorney Livingston never introduced any of this evidence and never attempted to do so.

Defendant Richard Austin asked attorney Livingston in 1977 to call witnesses on his behalf at trial (EH. Tr. 134). He specifically asked attorney Livingston to call Jack Charles Blankenship, Mary Scibilia, Mary Ward, Marilyn Lee, as well as family members (EH. Tr. 134-137, 139-140). Richard Austin asked attorney Livingston to go out and interview some of these witnesses and attorney Livingston said, "He didn't have the time or the manpower to be running all over the country running down witnesses." (EH. Tr. 135, 138). Richard Austin asked attorney Livingston to call his medical doctor to testify about his heart attack and pancreatitis but attorney Livingston did not (EH. Tr. 139).

In fact, attorney Livingston rarely met or talked with Richard Austin. The first conversation was in the presence of Joann Austin as described above. The other visits were to ask him to run down witnesses, which attorney Livingston declined to do and then Richard Austin "called him a couple of times about Casteel's statement" and that was the entire preparation before trial (EH. Tr. 155-156). Attorney Livingston's continuing theme was that this case will be put off and will not be tried (EH. Tr. 156).

Defendant Richard Austin testified during the guilt stage but before his testimony attorney Livingston did not go over his testimony with him (EH. Tr. 140) and before his testimony attorney Livingston did not prepare him for cross-examination (EH. Tr. 140--"We didn't talk

about it at all.").

This evidence is conclusive that attorney Livingston acted more as a prosecutor or at best as a neutral referee instead of being a zealous advocate for his client. Attorney Livingston's mistakes were so critical and serious that he simply did not function as constitutionally required "counsel" and as a result both the guilt phase and sentencing phase of defendant Richard Austin's state court murder trial were not reliable.

Attorney Charles R. Ray testified as an expert witness on this issue. Mr. Ray has practiced law since 1973 and is admitted to practice before the Supreme Court of the United States, the Sixth Circuit Court of Appeals, and the federal district courts in Tennessee and Kentucky. (EH. Tr. 208). Mr. Ray specializes in the practice of criminal defense law, is a member of the N.A.C.D.L., the T.A.C.D.L., and the Criminal Justice Section of the ABA, has been inducted into the publication "Best Lawyers of America" and has been certified by the National Board of Trial Advocacy as a criminal defense trial advocate. (EH. Tr. 208). Mr. Ray has litigated death penalty cases and based upon his review of the record, his expertise, and his experience, it is his opinion that attorney Robert Livingston rendered ineffective assistance of counsel in violation of Strickland v. Washington (EH. Tr. 209).

In addition, two Memphis attorneys testified at the first post-conviction hearing to the same effect. Attorney Russell X. Thompson who was qualified as an expert witness based upon his years of criminal defense practice in Memphis/Shelby County, Tennessee testified at the state post-conviction proceeding in December, 1983. Attorney Thompson was asked about attorney Livingston's failure to interview and call witnesses. (State Post-conviction Transcript at 499-500, 507). Attorney Thompson generally made the same criticisms and observations that attorney Ray

did concerning the failure to present any proof and the total abdication of any advocacy. Attorney Thompson specifically noted that attorney Livingston failed to investigate the case in a proper manner (State Post-conviction Transcript at 509-510); failed to adequately investigate substantial defenses (State Post-conviction Transcript at 511); and failed to have "any legitimate strategy in this case" (State Post-conviction Transcript at 511).

Attorney Livingston simply was not prepared. As trial judge Beasley testified, attorney Livingston "was notorious, so to speak, for announcing ready for trial." (EH. Tr. 362). This did not mean that attorney Livingston was in fact ready, it just meant he was commonly known to jump up and announce "ready" and not ask for continuances. (EH. Tr. 366-367).

Mr. Livingston refused to interview any of defendant Austin's family members and refused to call them as witnesses. Mr. Livingston never interviewed defendant Austin about the facts of the case right up to the point where he told defendant Austin he needed to take the witness stand. (Richard Austin affidavit and second affidavit, ¶ 14--part of Docket Entries 149 and 156).

Mr. Livingston did not present any evidence at the sentencing hearing. None. At the sentencing phase of a death penalty trial designed to allow the defendant great latitude in presenting mitigating evidence, attorney Livingston did not present a single iota of evidence as to defendant Austin's background, relationship to his employees, relationship with his family, how he had made his way in life or how he had been raised or his mental, emotional and physical status.

Attorney Livingston failed to object to the jury instructions with respect to their misleading requirement of unanimity concerning proof of mitigating circumstances.

The prejudice to defendant Austin is inescapable. This was a closely decided case where the jury acquitted Austin of first degree murder under count one and rejected three of the four

aggravating factors sought by the prosecutors. Attorney Livingston with proper investigation and preparation could have called as witnesses at the sentencing phase a number of people who were friends, family, employees and associates of defendant Austin (Richard Austin deposition, p. 23), such as Reed Buntyn (Austin deposition, p. 23), family members such as Midge Edwards (Austin deposition, p. 24), Billie Sue Edwards (Austin deposition, p. 24), Charles Edwards (Austin deposition, p. 25), James Edwards (Austin deposition, p. 25), Martha Purser (Austin deposition, p. 26), Jennie McDaniel (Austin deposition, p. 27), Joe McClary (Austin deposition, p. 28), Lester Leatherwood (Austin deposition, p. 28), employees Marie and Jack Hunter (Austin deposition, p. 25). Attorney Livingston consistently refused to talk to these witnesses and refused to consider using them (Austin deposition, pp. 27, 29). Attorney Livingston could have presented testimony from ministers (Austin deposition, p. 27) or even the Bishop of the Methodist Church (see Affidavit of Bishop Kenneth Carder--part of Docket Entry 149).

Attorney Livingston should have presented medical evidence about Richard Austin (Austin deposition, p. 30) and evidence concerning Austin's estranged wife, Joann Austin, who disappeared on the eve of trial. (Austin deposition, p. 55). Even Terry Casteel could have been called by attorney Livingston to testify as to mitigation for Austin and would have testified that "Richard never hurt anybody. He was kind to people. He would take people in.... He was always good to people, kind to people and would loan people money." (Casteel deposition, pp. 31-32). Finally, when attorney Livingston had Austin testify during the guilt phase, Livingston made no attempt to interview or prepare Austin for that testimony. (Austin deposition, p. 56). Even prosecutor McNeese testified that it is usual and customary in trial practice to interview witnesses before their testimony and to prepare them for that testimony. (McNeese deposition,

pp. 15-16).

Attorney Livingston has previously been judicially determined to have rendered ineffective assistance of counsel in the cases of United States v. Goodwin, 531 F.2d 347 (6th Cir. 1976); United States v. Stewart (No. 73-2125, U.S. Court of Appeals for the Sixth Circuit, Feb. 1, 1974); and Ronald E. Rickman v. Michael Dutton, (No. 3:85-0256, U.S. District Court, Middle District of Tennessee).

The benchmark for judging any claim of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984). A defendant must satisfy a two prong analysis. A defendant must show:

(1) that counsel's performance fell below an objective standard of reasonableness; Id. at 687, and

(2) that there is a reasonable probability that, but for the trial attorney's errors, the result of the proceeding would have been different. Id. at 692.

In judging the trial attorney's performance, a determination must be made as to whether the attorney's assistance was reasonable considering all the circumstances. Id. at 688. The court below correctly applied the Strickland test.

The same court recently ruled on the ineffective assistance of counsel issue in Glenn v. Tate, 1995 FED App. 0373P, No. 93-3568 (6th Cir. 12/21/95) where this Court denied a petition for the writ of certiorari. In Glenn v. Tate, the Sixth Circuit directed that the writ of habeas corpus should be granted in an Ohio death penalty case where the trial attorney rendered

ineffective assistance of counsel with respect to the mitigation/sentencing phase of the trial. In the Glenn case the court reviewed the ineffective assistance of counsel issue de novo and noted that "the jury was given virtually no information on [the defendant's] history, character, background, and organic brain damage--at least no information of a sort calculated to raise reasonable doubt as to whether this young man ought to be put to death. It was not that such information could not be found, or that counsel made a reasoned decision to withhold the information for tactical or strategic reasons. The information was not presented to the jury because counsel never took the time to develop it." Glenn at p. 5-6. The court also notes with approval in footnote 1 at page 6 the case of Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991) cert. denied, 503 U.S. 592 (1992) where the court "reject[ed] the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."

In the Glenn case, the Sixth Circuit Court of Appeals specifically notes at page 8 that the problem was lack of preparation by the defense lawyers in that the "lawyers made no systematic effort to acquaint themselves with their client's social history. They never spoke to any of his numerous brothers and sisters. They never examined his school records. They never examined his medical records...."

The prejudice element discussed in Glenn v. Tate which is Strickland's second prong requires a defendant to show that the particular errors were unreasonable and had an adverse effect on the defense. Id. at 693. The test for finding prejudice requires a showing "...that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is "a probability sufficient to undermine confidence in the outcome...." Id. at 694. See also, Glenn v. Tate at 13. See also, O'Neal v.

McAninch, 115 S.Ct. 992 (1995). The guiding principle of the courts in considering ineffectiveness of counsel claims is whether, despite a presumption of reliability, the result of a particular proceeding is probably unreliable due to a deficiency in the adversarial process. Strickland. at 696.

Strickland's prejudice element may sometimes be presumed especially where attorney Livingston had a conflict of interest in representing both Richard Austin and Joann Austin. Prejudice is legally presumed when the assistance of counsel altogether has been actually or constructively denied. Id. at 692; Powell v. Alabama, 287 U.S. 45, 56 (1932). The presumption of prejudice is justified where there have been various kinds of state interference with counsel's assistance. Id. The failure to subject the prosecution's case to meaningful adversarial testing raises a presumption of prejudice. United States v. Cronic, 466 U.S. 648, 659 (1984). The presumption is justified in circumstances where the prejudice is so likely that a case by case inquiry into the alleged prejudice is not feasible. Strickland, 466 U.S. at 692.

In this case there is no necessity to presume prejudice because defendant has demonstrated clear areas of prejudice. First, attorney Livingston failed to put on any proof at the mitigation/sentencing hearing when ample proof about Richard Austin's life history, medical history, and his care and consideration for others was available. Second, attorney Livingston failed to prepare Richard Austin for his testimony and failed to prepare him for cross-examination, leading to a confused and confusing presentation to the jury. Third, attorney Livingston had no theory of the case to present to the jury.

The sixth amendment and fourteenth amendment requirements of effective assistance of counsel also apply to the penalty phase. Strickland, 466 U.S. at 687. Courts are particularly

cautious in preserving a defendant's right to effective assistance of counsel at a capital sentencing hearing. See, e.g., Kubat v. Thieret, 867 F.2d 351, 367 (7th Cir.) cert. denied 110 S.Ct. 206 (1989); Deutscher v. Whitley, 884 F.2d 1152, 1160-61 (9th Cir. 1989); and Harris v. Dugger, 874 F.2d 756, 763 (11th Cir.) cert. denied 110 S.Ct. 573 (1989).

The quality of the representation afforded during the penalty stage of defendant's trial must be considered in light of the Supreme Court holding that "in capital cases it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of the defendant prior to the imposition of the death sentence." Gregg v. Georgia, 428 U.S. 353, 189 n.38 (1976).

The primary responsibility for insuring that these mitigating considerations are presented to the sentencing authority falls squarely upon defense counsel. A substantial failure to offer such information plainly constitutes ineffective assistance of counsel. See Mason v. Balcom, 531 F.2d 717 (5th Cir. 1976); United States v. Pinkney, 551 F.2d 1241 (D.C. Cir. 1976).

Even in non-capital cases, counsel has a constitutional obligation to present evidence to the sentencing authority of all relevant mitigating circumstances such as the background and character of the defendant. Counsel is ineffective "if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1977). It is the duty of counsel to interview potential witnesses and to make an independent examination of the factual circumstances in law involved.

During the sentencing phase of defendant's trial, defense counsel proved his lack of investigation by submitting no evidence. Trial counsel Livingston failed to call members of defendant's family or his friends or his employees or his doctor or any minister or expert--all of

whom were available to testify at the sentencing phase.

On this issue of ineffective assistance of counsel, the district court below stated in its Memorandum Opinion dated January 26, 1996 in the case of Richard H. Austin v. Ricky Bell, Warden, No. 3:86-0293 (United States District Court for the Middle District of Tennessee):

> The Court concludes that Petitioner received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments. The Court finds that attorney Robert Livingston failed to conduct sufficient investigation, failed to file sufficient pretrial motions, failed to present evidence at sentencing, and failed to call critically important witnesses during the guilt phase of trial.
>
> * * *
>
> Mr. Livingston did not present any evidence at the sentencing hearing. This is shocking because the sentencing phase of a death penalty trial is designed to allow the defendant an opportunity to present mitigating and humanizing evidence. However at Petitioner's sentencing hearing, Mr. Livingston did not present any evidence regarding Petitioner's personal background, relationships to friends and family, or mental or physical health. Mr. Livingston made this decision despite the existence of numerous witnesses who indicated at the evidentiary hearing that they had wished to testify.
>
> Mr. Livingston's actions undoubtedly caused prejudice to Petitioner. This was a closely decided case where the jury acquitted Petitioner of first degree murder under count one and rejected three out of the four aggravating factors sought by the prosecutors. If Mr. Livingston had properly investigated and prepared the case, he would have called multiple witnesses who were friends, employees, or associates of Petitioner, or who were religious leaders. Deposition of Richard Austin ('Austin Depo.') at 23-31. Mr. Livingston's failure to call witnesses was particularly problematic at the sentencing phase of the trial.
>
> Finally, Mr. Livingston should have interviewed Mr. Austin and prepared him to testify before Mr. Livingston called him to the stand during the guilt phase of the trial. Austin Depo. p. 56.

II. AT THE TIME OF DEFENDANT AUSTIN'S DIRECT APPEAL TENNESSEE HAD NO INDEPENDENT AND ADEQUATE PROCEDURAL DEFAULT RULE IN EXISTENCE AND THE TENNESSEE COURT DID NOT CLEARLY AND EXPRESSLY RELY UPON A PROCEDURAL DEFAULT RULE. ALTERNATIVELY, CAUSE AND PREJUDICE EXISTED SO AS TO EXCUSE ANY PROCEDURAL DEFAULT, ESPECIALLY WHERE, AS HERE, CLAIMS OF ACTUAL INNOCENCE AND INEFFECTIVENESS OF COUNSEL ARE AT ISSUE.

The factual basis for defendant Austin's ineffective assistance of counsel claim was specifically raised at the first post-conviction case in state court. Two different attorneys testified as expert witnesses in the Shelby County Criminal Court during defendant Austin's first post-conviction proceeding. Among the other issues that were raised in timely fashion at this first post-conviction proceeding was that attorney Robert Livingston who represented Austin at his death penalty trial failed to present any evidence whatsoever at the sentencing phase. Accordingly, the Keeney v. Tamayo-Reyes doctrine has no application.

In the alternative, the comity and procedural default aspects of cases such as Keeney v. Tamayo-Reyes do not apply considering the state of Tennessee law as it existed from 1976 through 1981 when defendant Austin was tried and when his first post-conviction proceeding was heard and appealed. There was no independent and adequate state procedural rule in effect in Tennessee at that time.

The procedural default rule is that if a federal habeas corpus litigant fails to follow an independent and adequate state procedural rule and the last state court rendering judgment in the case "clearly and expressly" based its opinion on such a state procedural rule, then the habeas corpus petition is subject to dismissal unless there is a claim of actual innocence or unless defendant shows cause to excuse his failure to bring such claims to the state courts and shows

actual prejudice to his defense. Coleman v. Thompson, 50 U.S. 722, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991); Harris v. Reed, 489 U.S. 225, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989). If the state of Tennessee has no such rule and if the state court did not "clearly and expressly" base its ruling on such a rule, there is no default. Harris v. Reed, 489 U.S. 225, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989).

T.C.A. §40-3812 at the time of defendant Austin's state court appeal provided that an issue or assignment was "waived" if it was not presented by defendant in each court proceeding where it could have been presented. At the time of defendant's appeal, this statute did not create an independent and adequate state rule because T.C.A. §40-3409 (which was repealed in 1981) provided that in a case such as defendant Austin's the state court appellant was not required to set forth issues or statements of error since the Supreme Court of Tennessee was "bound...to consider any errors in the record, whether there has been an assignment or not." James v. State, 385 S.W.2d 86, 90 (Tenn. 1964), cert. denied 381 U.S. 941, 85 S.Ct. 1777, 14 L.Ed.2d 705 (1965).

The holding of James v. State, supra, that the Tennessee Supreme Court must review the entire record and proceedings on direct appeal has been confirmed numerous times. Adams v. State, 547 S.W.2d 553 (Tenn. 1977); State v. Duncan, 698 S.W.2d 63 (Tenn. 1985), cert. denied 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 348 (1986); and State v. Martin, 702 S.W.2d 560 (Tenn. 1985).

Alternatively, in this case there was no clear and express statement by the Tennessee court that its opinion was based upon an independent and adequate state procedural rule. Accordingly, there is no procedural default bar in this case. As stated in Kenneth Wayne O'Guinn v. Michael

Dutton, 1996 FED App. 0194P (6th Cir.) No. 93-5578/5620 (U.S. Court of Appeals for the Sixth Circuit 7/3/96) (Merritt, J. concurring):

> In Harris v. Reed, 489 U.S. 225 (1989), the Supreme Court made it clear that procedural default does not bar consideration of a federal claim on habeas review unless the last state court rendering judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar. In that case, Harris filed a petition in Illinois state court for post conviction relief based on ineffective assistance of counsel. The state trial court dismissed the petition and the Illinois appeals court affirmed. The appeals court, while concluding that Harris could have raised his ineffective assistance claim on direct review, and stating that those issues that could have been presented on direct review are considered waived, went on to consider Harris' claims on the merits. On federal habeas review of Harris' claim, the Supreme Court concluded that the state court decision rested primarily on federal law because the Illinois appeals court did not 'clearly and expressly' rely on waiver as a ground for rejecting Harris' federal claim. Harris, 489 U.S. at 263 ('[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar.'). Similarly, in Coleman v. Thompson, 501 U.S. 722, 735 (1991), the Supreme Court held that
>
> > if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those [federal] claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the opinion.
>
> Id.; see also Caldwell v. Mississippi, 472 U.S. 320, 327-28 (1985) (presumption of federal jurisdiction on habeas review where state court's decision appears to rest primarily on federal law, absent a clear and express statement that the decision is based on independent state grounds); Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (same).

Accordingly, since the original decision of the Tennessee courts was based upon a federal claim concerning the sixth and fourteenth amendments, the procedural default doctrine does not apply.

The Tennessee Supreme Court originally affirmed the judgment in this case in State v.

Austin, 618 S.W.2d 738 (Tenn. 1981) and the Supreme Court denied the petition for a writ of certiorari in Austin v. Tennessee, 454 U.S. 1128 (1981). Thereafter, defendant Austin filed four additional state court post-conviction proceedings but relief was routinely denied. As the United States Court of Appeals for the Sixth Circuit stated in Kenneth Wayne O'Guinn v. Michael Dutton, No. 93-5578/5620 (U.S. Court of Appeals for the Sixth Circuit 7/3/96) at 29 (Merritt, J. concurring):

> ...this statement [routine denials] by the Tennessee appeals court does not 'clearly and expressly rely on an independent and adequate state ground; to decide the claim, as required by Harris and reaffirmed in Coleman. This blanket statement declining to review a number of claims, in fact, provides ample reason to question whether the denial of the ineffective assistance claim was based on waiver, a state ground, or a previous determination that counsel's conduct did not violate O'Guinn's constitutional rights, which a federal court must review on habeas.
>
> The conclusion that the claim has not been waived is also supported by the Supreme Court's decision in Ylst v. Nunnemaker, 501 U.S. 797 (1991). In Ylst, decided on the same day as Coleman, the Supreme Court stated that
>
> > where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion 'fairly appear[s] to rest primarily on federal law,...we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place.
>
> 501 U.S. at 803.

To apply the cause and prejudice standard, there must first be a firmly established state procedural rule which applies to the claim and the defendant must not have followed such firmly established state procedural rule. Warner v. United States, 975 F.2d 1207, 1213-13 (6th Cir. 1992), cert. denied, _____ U.S. _____, 113 S.Ct. 1314, 122 L.Ed.2d 702 (1993). In this case there was no such firmly established rule which was applied by the Tennessee court.

In the event, however, that this court should find that there was a Tennessee procedural default rule that applied to defendant Austin's direct appeal, then this court should consider whether there was cause and prejudice to excuse defendant's claims. The Supreme Court has not defined the word 'cause' and the Supreme Court has not set forth a list of factors that justify a finding of cause. Smith v. Murray, 477 U.S. 527, 534, 106 S.Ct. 2661, 2666, 91 L.Ed.2d 434 (1986). However, the Supreme Court has ruled that cause exists where the state inmate provides an explanation to excuse his attorney's failure to follow the state procedural rule and shows an objective factor external to the defense which prevented the attorney's effort to follow the rule or demonstrates ineffective assistance of counsel. See Reed v. Ross, 468 U.S. 1, 16, 104 S.Ct. 2901, 2910, 82 L.Ed.2d 1 (1984); Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2646-2650, 91 L.Ed.2d 397 (1986). Actual prejudice is shown when such errors work to the 'actual and substantial disadvantage' of the defendant. United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982). Defendant Austin satisfies this burden by his successful showing of incompetence of counsel.

The United States District Court below found the following with respect to procedural default concerning ineffective assistance of trial counsel (Austin v. Dutton, No. 3:86-0293, M.D. Tenn., slip opinion at 8-9):

> Upon reviewing the matter, the Court finds that in his first post-conviction proceeding the Petitioner raised the issue of ineffective assistance of trial counsel. The trial court found that Petitioner was not deprived of effective assistance of counsel in violation of his constitutional rights. On April 17, 1985, the Tennessee Court of Criminal Appeals affirmed that decision. Thereafter, the Tennessee Supreme Court denied Petitioner's application for permission to appeal.
>
> The State argues, however, that while petitioner timely raised some issues surrounding the ineffectiveness of his trial counsel, he did not specifically raise the

three claims stated above and therefore, Petitioner has procedurally defaulted on them. The Court does not find the State's argument persuasive. The Tennessee courts have had the chance to review Petitioner's record and to determine whether or not Petitioner had effective assistance of trial counsel. In that Petitioner has presented the overall claim of ineffective assistance of counsel to the Tennessee courts, the Court does not find that Petitioner should be penalized for his failure to present three sub-issues concerning his ineffective assistance of counsel claim. In fact, the Tennessee Supreme Court has stated that it "is not willing to penalize a criminal defendant for an incomplete and/or inaccurate assignment [of errors]. See Adams v. State, 547 S.W.2d 553, 557 (Tenn. 1977).

As noted above, the factual basis of this claim was presented to the state court at the first post-conviction through the testimony of two attorneys.

Further, in the alternative the procedural defaults claimed by appellant were the direct "result of ineffective assistance of counsel" rendered by attorney Livingston. Murray v. Carrier, 477 U.S. 478, 488 (1986). The errors of attorney Livingston were so serious as to "deprive the defendant of a fair trial...." Strickland v. Washington, 466 U.S. 668, 687 (1984), and this rendered the trial result unreliable.

Further, the exceptions to 28 U.S.C. §2254 apply as follows. The factual determination by the Tennessee court was erroneous as argued above in the ineffective assistance of counsel issue. No deference was due to the state courts on this issue because several of the exceptions to 28 U.S.C. §2254(d) apply, to-wit:

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;

* * *

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;
(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:....

Good cause existed with respect to these claims because defendant Austin was held incommunicado under solitary confinement type conditions in prison for almost eleven years commencing in 1977. These concerns were specifically raised in paragraphs 66 through 165 of defendant's petition for habeas corpus relief. Because of the intolerable and outrageous physical and mental problems created for death row inmates by the state of Tennessee, those inmates including defendant Richard Austin were unable to receive full, fair and adequate hearings in order to adequately develop the material facts of his case and were substantially impaired from consulting with attorneys. As a result, from and after the day of his trial conviction, defendant Austin was denied effective communication with the outside world including his counsel and was held under such depressing conditions that he could not function at the time when the state post-conviction proceeding was first filed. See the Stipulation of Facts and testimony in William Groseclose v. Cletus McWilliams.

Finally, there is an issue of actual innocence. This was a very closely decided trial as the state court jury "acquitted Petitioner of first degree murder under count one and rejected three out of the four aggravating factors sought by the prosecutors." Richard H. Austin v. Ricky Bell, No. 3:86-0293 (U.S. District Court for the Middle District of Tennessee, Memorandum Opinion 1/26/96 at 23).

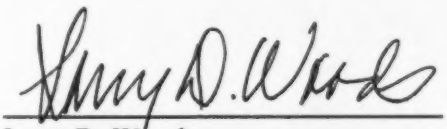
In Keeney v. Tamayo-Reyes, 504 U.S. 1, 12 (1992), this Court held: "We also adopt the narrow exception to the cause-and-prejudice requirement: A habeas defendant's failure to develop a claim in state court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." Cf. McCleskey v. Zant, 499 U.S., at 494; Murray v. Carrier, 477 U.S., at 496.

Defendant Austin's innocence was raised and presented to the Tennessee Supreme Court on direct appeal in the "statement of issues presented" as No. VIII in Assignment of Errors and Brief and Arguments in the Supreme Court of Tennessee in Austin v. State on September 15, 1978. This assignment specifically cited the "...insufficiency of proof and potential miscarriage of justice." (Appellant's Brief at p. 28).

CONCLUSION

Because the issues presented by petitioner Ricky Bell, Warden are so broadly stated, because the first issue concerning Keeney v. Tamayo-Reyes was not ruled upon directly by the United States Court of Appeals for the Sixth Circuit, because the issues concerning ineffective assistance of counsel were directly raised at the first post-conviction proceeding in the state courts, and in the alternative because Tennessee had no procedural rule effective to invoke the Keeney v. Tamayo-Reyes doctrine, defendant Austin respectfully urges that the petition for writ of certiorari as to these issues should not be granted.

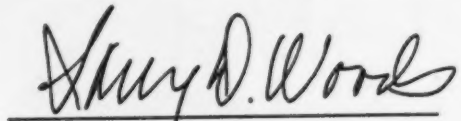
Respectfully submitted,



Larry D. Woods
WOODS & WOODS
P.O. Box 24727
Nashville, TN 37202-4727
(615) 259-4366
Attorney for Respondent Richard H. Austin

PROOF OF SERVICE

I hereby certify that two copies of the foregoing Respondent's Brief in Opposition have been delivered by the United States Mail, first class postage prepaid, to all parties required to be served including John Knox Walkup and Michael E. Moore, Office of the Attorney General, 425 5th Avenue North, Nashville, TN 37243-0497, on or before this 2nd day of February, 1998.



Larry D. Woods